Petition

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

MEMBERS OF THE BRIDGEPORT HOUSING AUTHORITY POLICE FORCE, et al

vs.

CITY OF BRIDGEPORT, et al

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Where a group of Black and Hispanic police officers performs identical services with competence equal to predominantly white officers, may their municipal employer satisfy its Title VII burden of justifying the discriminatory impact of its wage practices merely by showing that those paid a higher wage have passed an employment test, without any finding or evidence that the test is job-related?

2. Where a group of Black and Hispanic police officers performs identical services with competence equal to predominantly white officers, may their municipal employer pay them lower wages merely because they have been hired pursuant to an affirmative action program rather than ordinary civil service procedures?

PARTIES

The parties are as follows:

Members of the Bridgeport Housing Authority Police Force: Hubert Sims, Nate Santiago, William Liggins, Pedro Rivera, Frank Davis, Edward Lomax, Hector Resto, Ramon Laracuenta, Bruce Simons, Reginald Taylor, Willie McBride, Anthony Gomes, Frank Maldonado, Pedro Villaneuva, Douglas Quarrels, Antonio Brown, Serafin Garcia, Ulysses Allen Davis, Pedro A. Hernandez, James Lomax, Luis Santana, Walter E. McNeil, Jose M. Rodriguez, Cecilia Ortiz, Nathaniel Ham, Jr., Kenneth E. Farrar, Preston James Caviness, Robert B. Cox, Jr., Antonio Bargos, Pedro Luis Cosme, Donald Peeler, Eddie Tosado, Elbert Barnes, Juan Crespo, Hector Jiminez, Remijio Alvarez, David Clark, Miguel A. Nieves, George Alcover, James Mitchell, Petro Marrero, Ramos Ladisloa, Richard Silva, James Smith, Peter Aranjo, Angel Duran, and The Bridgeport Guardians, Inc. and Arthur Carter,

PLAINTIFFS

VS.

The City of Bridgeport: John Mandanici, Individually and as Mayor of the City of Bridgeport; Joseph Walsh, Individually and as Superintendent of the Police Department; The Board of Police Commissioners of the City of Bridgeport: John R. Hungerford, Frank Delaquila, John K.

Bourque, Jerome Mitchell, Elmer Rinko and John Guman, Individually and as Members of Said Board; The Civil Service Commission of the City of Bridgeport: John B. Kennedy, Edward Daley, Julius Nobili, Antoinette LaRose, and Richard Palumbo, Individually and as members of that Commission; Allen Cohen, Individually and as Director of the Civil Service of the City of Bridgeport; The Housing Authority of the City of Bridgeport: Clarence T. Williams, Leonard N. Mainiero, Henry Lugo, Jr., Ralph A. Rainiero and Mark F. Gross, Individually and as Commissioners of said Housing Authority; and Donald Haywood, Individually and as Executive Director of the Bridgeport Housing Authority, Robert Gilmore, Director, Employment & Training Administration, Individually and officially

DEFENDANTS

and

Gregory Iacovetti, William Gombar, Eugene P. O'Neil, Ward N. Colbree, William Giblin, Robert Fitzgerald, James Remele, Philip Napolitano, Robert Biroscak, Richard Petitte, Cornelius Carrol, Robert Mencel, Arnold Briglia and Leo Krunuski and Local 1199, AFL-CIO

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 646 F.2d 55 (2d Cir. 1981). The opinion of the United States District Court for the District of Connecticut on the issue of liability is reported at 85 F.R.D. 624 (D.Conn. 1980). The District Court's Memorandum of Decision and Order with respect to Remedy is reported at 499 F. Supp. 760 (D.Conn. 1980). All these opinions are reproduced in the Appendix.

JURISDICTION

The opinion of the Court of Appeals was filed April 20, 1981, and its judgment entered that day. Jurisdiction to review the judgment in question by writ of certiorari is conferred by Title 28 United States Code Section 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sections 703(a) and (h) of Title VII of the Civil Rights Act of 1964 provide in pertinent part:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

STATEMENT OF THE CASE

Plaintiffs are the members of the Bridgeport Housing Authority Police Force. The Housing Police were created in 1970 with Model Cities Act funds, and since that time they have provided police protection on behalf of the City of Bridgeport for the poor, predominantly Black and Hispanic, residents of the City's seven public housing projects.

The Housing Police were selected through interviews and investigation by a committee including community residents as well as Bridgeport Police Department representatives. Preference was given to neighborhood residents, and efforts were made to recruit qualified minority applicants. In part as a result of these affirmative action efforts, all of the Housing Police are either Black or His-

panic . By contrast, the Bridgeport Police Department (in a City which is 41% Black and Hispanic) is 87% white and 13% racial minorities, proportions that reflect a history of exclusion of minorities followed by limited court-ordered minority hiring. See Bridgeport Guardians v. Members of the Bridgeport Civil Service Comm'n., 482 F.2d 1333 (2d Cir. 1973), cert. denied, 421 U.S. 991 (1975). Hiring for the Bridgeport Police Department is based solely on the results of a civil service test.

The central factual finding of the District Court and the Court of Appeals was that "the Housing Police performed identical services with competence equal to that of City [of Bridgeport] Police officers." App. 5. Moreover, those courts found, the Housing Police "receive training in classes equal in length and content to that of the City Police," id.,

and they "have an exceptionally difficult and dangerous assignment [because t]he housing projects are low income and high crime areas." App. 29. Yet the all-minority Housing Police are paid far less than City police officers (about two-thirds the salary for a twenty-five per-cent longer work week).

The District Judge found that the City's maintenance of two categories of police officer--with one, all-minority category paid much less than the other, predominantly white--was unlawful race discrimination. That practice had a striking disparate racial impact, in that only minorities received lower pay for equal work, while 87% of those given higher pay were white, App. 78, and was, the trial judge found, motivated by racial animus. App. 42-46, 87-92. The City defended its dual wage practice merely by showing that it predicated

receipt of higher pay on passing a civil service test for City police officer. It introduced no evidence, and the District Judge accordingly made no findings, that these tests were in any way job-related. The District Judge rejected the City's claim that bare administration of a test legitimated the racially discriminatory effects of its wage practices.

Moreover, he concluded, this discriminatory effect was intentional, the product of racial animus, and, accordingly, was unlawful discriminatory treatment. App. 42 - 46, 87-92. The dual wage system was not justified by any differences in the content or quality of the work done by the Housing and City police, since there were no differences except that "the Housing Police have a particularly difficult and dangerous assignment." App. 29. Its striking racial impact was obvious to the City, whose own affirmative

action plan condemned the treatment of the Housing Police. These facts gave rise to an inference of purposeful discrimination.[1/] While the City introduced evidence that its adherence to civil service requirements showed a non-discriminatory motive for excluding the Housing Police from the Bridgeport Police Department, it introduced no evidence of a non-discriminatory motive for paying the Housing Police lower wages to perform the same work as the City police. On the contrary, the only defense witness who was even asked the reason for the difference in wages, the

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1/ This inference was buttressed by the fact that the City actually violated federal law to keep the Housing Police in an inferior status, by its having bent its civil service rules in the past to help a white employee become a City police officer without passing the entrance test, and by its "deplorable" reputation as a racially discriminatory employer.

director of civil service, testified that he did not know the reason.

The Court of Appeals nevertheless reversed the District Court's determinations of liability under Title VII and the Equal Protection Clause.[2/] While accepting that the inequality in wages and treatment of the Housing Police established a prima facie case of both disparate treatment and disparate impact under Title VII, the Court of Appeals concluded that

> the City's use of civil service examinations as a qualification for hiring into the regular Police Department provides a complete defense to the Title VII claim.

App.11.

[2/] It simultaneously upheld the finding that the City had violated the Model Cities Act by failing to give the Housing Police civil service status, and it reversed the finding of liability under the Comprehensive Employment and Training Act.

The Court of Appeals specifically identified as "the salient difference between the two forces," "the basis on which hiring decisions are made," App. 5. It agreed with the District Judge's finding that in work, training, and competence the two forces were indistinguishable. Nonetheless, it concluded, the City was entitled to pay the Housing Police less than City police officers because the Housing Police had been hired pursuant to an affirmative action program rather than the City's civil service testing system. The City's policy of paying lower wages to employees hired under an affirmative action program the court concluded, was a bona fide merit system within the meaning of Section 703(h) of Title VII. Although the City had introduced no evidence to show the utility of its tests--general aptitude measures whose content was unrelated to police knowledge--the

Court of Appeals also concluded that setting wage rates according to test score rather than job performance served the City's interest in attracting promotable officers to the regular police force. The City completely discharged its obligation not to discriminate, the Court of Appeals held, when it permitted the Housing Police to attempt to win appointment to the City police force by competing with the general public on the general aptitude tests used as City police entrance exams.

ARGUMENT

I. THE JUDGMENT OF THE COURT OF APPEALS IS INCONSISTENT WITH THIS COURT'S DECISIONS REQUIRING EMPLOYERS TO DEMONSTRATE THAT EMPLOYMENT PRACTICES WITH AN ADVERSE IMPACT ON MINORITIES ARE JOB-RELATED.

In reversing the District Court's judgment invalidating the regime of wage inferiority imposed on the all-minority Housing Police, the Court of Appeals departed from clear and settled rulings of

this Court and adopted an approach to Title VII defenses that, if unreversed, will eviscerate the protections of Title VII. For this reason, the petition should be granted. By finding that "the City's use of civil service examinations as a qualification for hiring into the regular Police Department provides a complete defense to the Title VII claim," App. 11, the Court of Appeals undercut the central Title VII requirement that employers must justify practices that have a disparate impact on minorities by showing that those practices are job-related.

The Court of Appeals did not dispute that the City's treatment of the Housing Police had an adverse impact on racial minorities because all the Housing Police are Black or Hispanic. However, the Court of Appeals held that this adverse impact was justified by business necessity because the City predicated payment of

higher wages on the passing of an employment test that was a prerequisite to appointment to the regular Bridgeport Police Department.

But the District Court did not find, indeed the defendants did not contend, that the tests in question were "demonstrably a reasonable measure of job performance." Griggs v. Duke Power Co., 401 U.S. 424, 436 (1970). In fact, no evidence whatever of job-relatedness was introduced at trial.

This Court has made it clear that where an employment practice neutral on its face has a disparate racial impact, it is not a sufficient defense simply that the employer gave a test, rather the employer has the burden of establishing that the test is job-related. This is the central teaching of Griggs. Absent evidence of business necessity, the District Court may, as it did here,

"'assume no justification exists,'" for a questioned practice. Nashville Gas Co. v. Satty, 434 U.S. 136, 143 (1977).

The Court of Appeals may have departed from these well-established rules because it confused claims of hiring discrimination with claims of wage discrimination. It noted the District Judge's observation that "this is not a hiring case," App. 12, but misunderstood his point, which was that the City's belated adoption of hiring tests which did not have a disparate impact was lawful without regard to the job-relatedness of the tests. The absence of a disparate impact on new hiring, however, was not the equivalent of a demonstration that the tests were job-related, and it could not, therefore, justify wage discrimination against minorities who had already been hired. App. 87-92.[3/]

[3/] While the Court of Appeals also relied on a state court decision finding

In order to justify the practice being challenged in this case, the City was required to show that its civil service tests were actually relevant to plaintiffs' qualifications to perform their duties (or, perhaps, as the Court of Appeals suggested, to perform successfully if promoted). But it did not even attempt to do so. Indeed, the District Court's findings strongly suggest that the tests were not job-related, for if they had been it seems unlikely that many of the Housing Police, who performed so expertly in the field, would not have passed them. The decision of the Court of Appeals, in short, is inconsistent with this Court's fundamental teachings and should be reversed in order to pre-

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3/ (cont.)

one of the tests job-related, App. 12. the state court did not purport to apply Title VII standards in litigation brought by white applicants under state law. Nor were petitioners parties to that litigation.

serve Title VII's role in eliminating arbitrary, invidious discrimination in employment.

II. THIS COURT SHOULD RULE THAT MINORITIES WHO DO THE SAME WORK EQUALLY WELL AS WHITE EMPLOYEES MAY NOT BE PAID LOWER WAGES MERELY BECAUSE THEY WERE HIRED PURSUANT TO AN AFFIRMATIVE ACTION PROGRAM, RATHER THAN CIVIL SERVICE PROCEDURES.

In rejecting the District Court's findings of racial discrimination and upholding payment of lower wages to the Black and Hispanic Housing Police who, as the District Court found, "performed identical services with competence equal to that of City police officers," App. 5, the Court below disregarded this Court's careful warnings of the danger that affirmative action can operate as a subterfuge to injure its purported beneficiaries. Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (opinion of Marshall, J., concurring in the judgment); Regents of the University of California v. Bakke,

438 U.S. 265, 298 (1979) (opinion of Powell, J.); id. at 360-61 (opinion of Brennan, White, Marshall, and Blackmun, JJ.); United Jewish Organizations v. Carey, 430 U.S. 144, 173-74 (Brennan, J., concurring in the judgment). In addition to ignoring settled Title VII principles by assuming tests were job-related without evidence or findings, the Court of Appeals held that merely because the City gave a test for the position of City police officer its payment of lower wages to police officers selected through affirmative action efforts rather than the civil service testing procedure was authorized by Title VII's approval of bona fide merit systems. 42 U.S.C. Section 2000e-2(h). App.12. This expansive reading of Section 703(h) effectively immunizes any unfavorable treatment of employees previously given special affirmative action consideration

in the hiring process.

The District Judge not only found that the all-minority Housing Police performed the same job equally as well as the predominantly white City police officers; he also found that the Housing Police had received the same training and were subject to the same supervision, discipline, and control by the Bridgeport Police Department administration and supervisory staff as their higher paid, predominantly white City police counterparts. App. 28 - 31. The Court of Appeals conceded that the only "salient difference" between the two groups in addition to their racial composition was "the basis on which hiring decisions are made." App. 5. This Court, therefore, need not measure equivalence of tasks or performance; these are established by uncontradicted evidence. The issue is instead whether, as the Court of Appeals con-

cluded, discrimination in favor of those hired pursuant to orthodox civil service procedures and against the beneficiaries of affirmative action is a "complete defense" to Title VII liability. Both the fundamental goal of racial equality which has led this Court to sanction affirmative action programs in the past and the central principle of racial neutrality embodied by Title VII, require that it should not be and that this Court should announce that the beneficiaries of affirmtive action in selection may not forever after be treated as second class citizens without regard to their performance.

When this Court approved a voluntary, race-conscious affirmative action program in United Steelworkers v. Weber, 443 U.S. 193 (1979), it did so because like Title VII itself the plan was "designed to break down old patterns of racial

segregation and hierarchy," id. at 208. This central function of permissible affirmative action programs is undercut if a regime is sanctioned in which old patterns of job segregation are simply replaced by new patterns of wage segregation.

Similarly, in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), a majority of this Court, while disapproving the special admissions program of the Medical School of the University of California at Davis, acknowledged that such admissions programs may constitutionally take race into account. 438 U.S. at 320. The rule announced by the Court of Appeals in this case would permit a law school, for example, to deny Black beneficiaries of affirmative action admission efforts membership on the Law Review even if they were qualified by virtue of their

scholastic performance. Such a regime, like the one endorsed here, would turn affirmative action into a license for discrimination and the perpetuation of disparate treatment on the basis of race.

Equally dangerous, the ruling of the Court below invites the perpetuation of intentional discrimination by permitting it to mask as affirmative action. Employers who, out of concern about legal liability or for any other reason make race a factor in hiring decisions will hereafter have a "complete defense" to any invidious treatment they inflict on the minority beneficiaries of affirmative action. Such a result is at odds with this Court's concern carefully to structure the proof process in Title VII cases to permit identification of invidious discrimination. See Texas Department of Community Affairs v. Burdine, ___ U.S. ___, 49 L.W. 4214 (March 4, 1981);

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

The result reached by the Court of Appeals is, finally, also at odds with the antidiscrimination principle, the principle of racial neutrality, which underlies Title VII. Affirmative action has been invoked by the Court of Appeals to justify the City of Bridgeport's failure to pay its minority workers wages commensurate with their skills and job performance. This result turns the notion of affirmative action against itself and unless reversed would signal a retreat from Title VII's central concern with insuring that employment benefits are based upon job performance rather than group membership. At a time when affirmative action programs have become quite common in the United States, encouraged in part by this Court, it is important for the Court to insure that such programs do not

operate to perpetuate or create unequal treatment of the races. Accordingly, the petition should be granted.

Respectfully submitted,

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Counsel for Petitioners

APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1521, 1539, 1540—September Term, 1979

(Argued July 25, 1980 Decided April 20, 1981)

Docket No. 80-7488, 80-7506, 80-7518

MEMBERS OF THE BRIDGEPORT HOUSING AUTHORITY POLICE FORCE, *et al.*,

Plaintiffs-Appellees,

—v.—

CITY OF BRIDGEPORT, *et al.*,

Defendants-Appellants,

and

BRIDGEPORT POLICE UNION, LOCAL 1159, AFSCME, COUNCIL NO. 4,

Intervenor-Defendant-Appellant,

and

GREGORY IACOVETTI, *et al.*,

Intervenors-Defendants-Appellants.

Before:

VAN GRAAFEILAND and NEWMAN, *Circuit Judges*, and NEAHER*, *District Judge*.

Appeal from a judgment of the District Court for the District of Connecticut (T.F. Gilroy Daly, Judge) finding the City of Bridgeport to have discriminated against Housing Authority Police, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1976); 42 U.S.C. ____ 1981 and 1983 (1976); the Demonstration Cities and Metropolitan Development Act of 1966, 42 U.S.C. § 3301 *et seq.* (1976); and the Comprehensive Employment and Training Act, 29 U.S.C. § 801 *et seq.* (1976 and Supp. II 1978).

Affirmed in part, reversed in part, and remanded.

THOMAS W. BUCCI, Office of City Atty., Bridgeport, Conn., *for appellants*.

J. DANIEL SAGARIN, Milford, Conn. (William B. Barnes and Harrigan, Hurwitz, Sagarin & Rutkin, P.C., Milford, Conn., on the brief), *for individual intervening defendants-appellants*.

W. PAUL FLYNN, New Haven, Conn. (Kopkind, Flynn & Raccio, P.C., New Haven, Conn., on the brief), *for intervening de-*

* The Honorable Edward R. Neaher of the United States District Court for the Eastern District of New York, sitting by designation.

fendants-appellants Bridgeport Police Union, Local 1159.

DAVID N. ROSEN, New Haven, Conn., *for appellees.*

NEWMAN, *Circuit Judge*:

This is an appeal from a judgment of the District Court for the District of Connecticut (T.F. Gilroy Daly, Judge), finding that the City of Bridgeport has discriminated against members of the Bridgeport Housing Authority Policy Force ("Housing Police") because their terms and conditions of employment are less favorable than those of members of the City's Police Department. *See* 85 F.R.D. 624 (D. Conn. 1980) (ruling on preliminary injunction). The Court found the City to be in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1976); 42 U.S.C. §§ 1981 and 1983 (1976); the Demonstration Cities and Metropolitan Development Act of 1966 (Model Cities Act), 42 U.S.C. § 3301 *et seq.* (1976); and the Comprehensive Employment and Training Act (CETA), 29 U.S.C. § 801 *et seq.* (1976), *as amended by* CETA Amendments of 1978, Pub. L. No. 95-524, 92 Stat. 1909. The Court ordered a broad remedy, including incorporation of the Housing Police members into the Police Department with full employee benefits, back pay, and civil service status. We conclude that the only statute violated was the Model Cities Act, for which the remedy is simply the conferring of civil service status. We therefore vacate in part and remand.

Facts

The Housing Police began providing security for the City's public housing projects on a full-scale basis after 1970, when federal funds for such employment were received under the Model Cities Act by the Bridgeport Housing Authority, which administers the City's seven public housing projects. The Housing Police expanded to 52 members in 1974, the last year in which any officers were hired; the force currently has 27 members, all of whom are Black or Hispanic.

The Bridgeport Police Department numbers 400 officers. In 1975 the examination administered by the City for employment as police officer was successfully challenged as a discrimination against minorities, and quota hiring was ordered. *Bridgeport Guardians v. Members of the Bridgeport Civil Service Commission,* 354 F. Supp. 785 (D. Conn.), *aff'd in part and rev'd in part,* 482 F.2d 1333 (2d Cir. 1973), *cert. denied,* 421 U.S. 991 (1975). As a result of that litigation, and two subsequent selection tests, minority representation on the force has risen from 3 percent to 13 percent. Virtually all the Housing Police members who are plaintiffs-appellees in this case took the subsequent examinations but did not achieve a passing score. However, ten former members of the Housing Police passed the exams and have been appointed to the Police Department. The constitutionality of these examinations is not challenged in this lawsuit.

Funding for the Housing Police came primarily from the Model Cities Act, which expired in 1975. At that time, the City assumed responsibility for financing the Housing Police for one year but thereafter refused to continue that funding for budgetary reasons. The Housing Police were then funded as CETA participants,

supplemented by City funds received under the "block grant" provisions of the Community Development Act (CDA), 42 U.S.C. § 5301 *et seq.* (1976). Appellees' eligibility for CETA financing expired at the end of 1979. They have continued to receive their salaries during this litigation through the block grant funds, with no guarantee from the City of a permanent place in its budget.

The Housing Police receive training in classes equal in length and content to that of the City Police,[1] and perform the duties of police officers within the low-income, high-crime areas they serve. The District Court found, based on uncontradicted testimony concerning the nature and quality of appellees' work, that the Housing Police performed identical services with competence equal to that of City Police officers.

The salient difference between the two forces is the basis on which hiring decisions are made. Hiring for the Housing Police followed the guidelines of the Model Cities Act, which required selection by a committee of residents of the model cities neighborhoods and a member of the City Police Department. The selection committee carried out the Act's policies of both affirmative action with respect to minority members and preference for neighborhood residents. The Police Department, under the City's standard civil service practices, hires

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1 Housing Police hired prior to 1970 were not formally trained. Before 1970, all police protection for the housing projects was provided by the Police Department, supplemented by a small group of no more than seven Housing Authority Special Police officers. This group expanded into the current Housing Police when federal funds were received. After 1970, the Housing Police took the City's police training course, which virtually all completed. The course lasted up to 16 weeks full-time, depending on the particular program in effect at the time for the City's police officers.

applicants strictly in accordance with the ranking of their passing scores on a written examination. Reflecting this difference in the method of initial selection, the two entities have been treated as entirely separate units. The Housing Police are paid substantially less than the officers of the Police Department,[2] and lack the job security, pension benefits, and procedural protections available to the regular police force.

The District Court's Decision

The District Court found the City[3] liable for discrimination against the appellees in violation of § 703(a) of Title VII, 42 U.S.C. § 2000e-2(a) (1976). The Court found that discrimination had been established under both the disparate impact and disparate treatment theories of liability and that the discrimination was intentional. The Court emphasized that members of the two forces received the same training and performed the same duties, yet the Housing Police received pay and benefits significantly less than those of the Police De-

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2 In 1977, for example, a veteran Housing Police officer received $10,000 for a 40-hour week, while a comparable Police Department officer received $15,000 for a 32-hour week.

3 Other defendants named in appellees' complaint, which was first filed in 1977, included the Civil Service Commission, Board of Police Commissioners, Bridgeport Housing Authority, United States Department of Labor and United States Department of Housing and Urban Development. The District Court granted plaintiffs-appellees' motion for a bifurcated trial, and on the issue of liability, found for the federal defendants on all counts, and for the Housing Authority on all counts but the Model Cities Act claim, holding the Authority liable for failure to attempt to effect compliance with that Act. The Court held the City and its officers liable for intentional discrimination on all counts. Appellants Bridgeport Police Union, Local 1159 and individual officers of the Police Department intervened as defendants only at the remedial stage of the proceedings.

partment. This disparate treatment of the two forces was found to have a disparate impact on minorities because the minority percentage of the Housing Police is 100% and the minority percentage of the Police Department is 13%. The critical aspect of the Court's decision concerns the rejection of the City's justification for maintaining the two forces with their different benefit provisions. The City had contended that higher benefits were available to the Police Department not because of the racial composition of that force but solely because all members of that force had successfully completed the required civil service examination, whereas members of the Housing Police had not passed any qualifying examination. The District Court rejected the legitimacy of the City's justification because of Section 6 of Bridgeport's City Charter.

Section 6, reprinted in the margin,[4] provides that when the City "absorbs or assumes operation of an

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[4] Section 6. Any person holding a position in the classified service when this act shall take effect, with the express exception of employees and officers of the department of public welfare and all of its branches and divisions, who shall have served in such position for a period of at least three months, shall be retained without preliminary or performance tests, and shall thereafter be subject in all other respects to the provisions of this act. Any others in the classified service at the time this act shall take effect shall be regarded as holding their positions under probationary appointment. Each person holding an office created by ordinance and serving for a stipulated term shall continue in such office until the expiration of such term, at which time such office shall be filled, pursuant to the provisions of this act. In the event that the city absorbs or assumes operation of an enterprise or function from, and theretofore conducted or performed by, the federal government, or any agency thereof, the state or another governmental sub-division thereof, or any private individual, business or agency, those employees who have been continuously engaged in such enterprise or function so taken over for not less than one year and who may be considered essential to its operation by the authority or officer of the city who has supervision of such new

enterprise or function . . . performed by" the federal government, the state or some subdivision thereof, the employees considered essential to its operation and employed for at least one year are to be "retained without preliminary or performance tests." The Court found that the City had assumed the federal government's function in funding the Housing Police, whose members were all essential to its operation, and that under the Charter, this precluded the City from requiring appellees to take an entry exam, the alleged basis for the City's distinction between the two forces.

The District Court not only relied on Section 6 of the City Charter to reject the legitimacy of the City's basis for distinguishing between the two forces, but also inferred primarily from the City's disregard of the obligations imposed by Section 6 that the true motivation for the disparate treatment of the two forces was their different racial composition. The conclusion about deliberate discrimination also rested to some extent on other factors. The Court noted that the City had disregarded a regulatory letter issued by the Department of Housing and Urban Development (HUD) under the Model Cities Act, requiring fund recipients to incorporate jobs funded under the Act into permanent employment positions. The Court also relied on evidence that one White employee had been retained after a reclassification of her position without being required to

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enterprise or function and the personnel director, shall be retained without preliminary or performance tests, and shall be regarded as holding their positions under probationary appointment, and shall thereafter be subject in all respects to the provisions of this act.

The concluding sentence concerning employees engaged in an enterprise or function which the City "assumes operation of or absorbs" was added to the Charter by amendment in 1945, Special Act No. 431.

take a new competitive examination.[5] Finally, the Court took notice of the City's generally "deplorable reputation" as a discriminatory employer, citing prior employment discrimination cases involving Bridgeport.

The conclusions concerning intentional discrimination also served as the basis for finding the City liable under 42 U.S.C. §§ 1981 and 1983.

The District Court also held the City liable for violating requirements of the Model Cities Act and CETA. Initially, the Court determined that implied private causes of action could be maintained under both statutes. The Model Cities Act violation stemmed from the City's failure to incorporate the Housing Police into the City's civil service system, as required by CDA Letter Number 11,[6] an administrative directive issued by HUD

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5 In 1957 the City hired Florence Jepson as a "police investigator" and some of the evidence suggested that her duties consisted of work as a jail matron. The City created the position of "police woman" in 1969, and Mrs. Jepson was ineligible to take the competitive examination for that post because of her age. Nevertheless she was given the new position, without taking the test, which entailed a salary increase and, as found by the District Court, a change in duties from work as a matron to the full range of duties of a police officer. The City contended that the employee had been granted a waiver from taking the test, for a position merged into her prior post, for which she had competed successfully in an examination twelve years earlier. This instance was the only example the Court found in the forty-five years of the City's civil service system of an individual's receiving a civil service post without taking the necessary qualifying exam.

6 Section 2(c) of CDA Letter No. 11 provides:

> In the case of public employment generated in components of the comprehensive city demonstration program, financed in whole or in part by supplemental or other HUD funds, such jobs will be incorporated into the community's regular civil service system within a reasonable period of time not to exceed two years from the point that positions were filled. Actions to accomplish this will be initiated in each community within six months of the date of issuance of this Letter. Such positions will be filled through a

with respect to all positions funded under the Model Cities Act. The CETA violation concerned § 122(f) of CETA, 29 U.S.C. § 824(f) (Supp. II 1978), which proscribes an "artificial barrier to public employment." The Court concluded that the police civil service exam was an "artificial barrier" when applied to the Housing Police because, in the Court's view, Section 6 of the City Charter exempted them from such testing.

Title VII

We agree with the District Court that the undisputed facts show performance of equivalent duties and receipt of unequal benefits, and we are willing to assume that appellees have established a traditional *prima facie* case of discrimination by the City,[7] *see Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *McDonnell Douglas*

Model Neighborhood resident recruitment and training system in conformity with the policies of this Letter and the positions will carry full public employee rights and benefits.

CDA (Community Development Act) Letter No. 11, United States Department of Housing and Urban Development, *Model Cities Resident Employment and Training Requirements* (Nov. 1970).

7 The City disputes on appeal the finding that it was the employer of the Housing Police, citing a Connecticut Labor Board decision that the Housing Police were to negotiate their contract with the Housing Authority, *City of Bridgeport v. Bridgeport Housing Police Local 1303*, Case No. MPP-3081, Decision No. 1492 (Conn. Bd. Lab. Rel. Feb. 1, 1977), *appeal dismissed*, No. 115665 (C.P., Fairfield Cty. Jan. 31, 1978). We agree with the District Court that the City, and not the Housing Authority, was their employer for purposes of all of the federal claims in this suit. As the record showed, the City Police Department supervised and directed the Housing Police, and the City set their wage scales and paid them. The Executive Director of the Housing Authority testified about that entity's lack of authority over wage rates: on one occasion when the Housing Authority agreed to a salary increase for the members of the force, raising their wage rates to the level of Police Department officers, the City refused to pay that amount.

Corp. v. Green, 411 U.S. 792 (1973), even though this is the unusual case where the high minority percentage in the disfavored group results directly from deliberate affirmative action to recruit the Housing Police from minority residents of the housing projects. However, we disagree with the District Court in its ultimate conclusion that Title VII has been violated because we are satisfied that the City's use of civil service examinations as a qualification for hiring into the regular Police Department provides a complete defense to the Title VII claim.

An employer's use of a job-related examination does not violate Title VII even though it results in a disproportionately high percentage of minority applicants not being hired at all. It is difficult to see why the Housing Police, who had a fair opportunity to compete for the Police Department positions, have a valid Title VII claim when, instead of being offered no employment opportunity whatever, they were offered policing employment at benefits below those of the Police Department officers. Or, to put it another way, if a job-related test may be used to select those who will be employed, it may also be used to select those who will receive higher employment benefits. The rationale for doing so is especially strong in filling entry-level police positions because the virtual absence of lateral entry into the promotional ranks of police departments means that entry-level hiring not only fills entry-level positions, but also provides the pool from which senior ranks will eventually be filled. The City is entitled to offer higher benefits to those who successfully complete the job-related selection process so that those with potential for advancement will be attracted to the entry-level ranks and will have an incentive to remain with the Police Department.

Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) (1976), not only permits valid tests but also specifically permits employers to apply different standards of compensation and other terms of employment pursuant to bona fide merit systems. Appellees are not, in this litigation, attacking the bona fides of the merit system for hiring into the Police Department.[8] As the District Judge recognized, this is not a hiring case. Indeed, the job-relatedness of the most recently used entry-level examination for Bridgeport police officers has been upheld in state court litigation. *Armeno v. Bridgeport Civil Service Commission*, No. 167722 (Super. Ct. Conn. July 28, 1978).

Our conclusion is not altered by the existence of the City Charter requirement that obliges the City to employ, without qualifying examinations, essential employees with one year on the job whenever the City assumes operation of a function previously performed by the federal government. This provision of the Charter appears never to have been construed by any state court, and it is far from certain whether it applies to the present situation where the City has used some of its own funds and later CDA and CETA funds to continue funding an activity previously funded with Model Cities funds. Moreover, even if applicable, it is uncertain whether the Charter provision requires anything more than a grant of civil service status, or whether it also requires absorption of federally funded employees on terms equal to those performing equivalent tasks. If

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8 The one instance, disclosed by the record, when a White employee was accepted into a civil service position without the requirement of an examination, *see* footnote 5, *supra*, is an isolated occurrence, totally insufficient to undermine the bona fides of the Police Department's merit hiring system.

these interpretive choices were critical to the decision in this case, it might be appropriate to have them made by the state courts, *see Harris County Commissioners Court v. Moore,* 420 U.S. 77, 82-85 (1975). However, regardless of how expansively the state courts might construe the local Charter requirements, those provisions would not create federal law liability for affording higher benefits to those hired pursuant to civil service examination. If appellees are being denied any rights grounded in local law, they can vindicate such rights in the state courts.[9]

In rejecting Title VII liability in the circumstances of this case, we note the absence of any evidence that minority group members have been denied a full opportunity to compete for positions in the Police Department, or have been steered into positions with the Housing Police. On the contrary, it appears that virtually all members of the Housing Police have taken the examination for the Police Department, and those who passed have been hired. Moreover, it is undisputed that the reason for the minority composition of the Housing Police is not that minority group members have been

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9 We note the absence of any claim or evidence that the City was aware of any obligation imposed by Section 6 of the Charter to hire the Housing Police as members of the Police Department without requiring civil service examination. The District Court's interpretation of the Charter had not been previously adopted by any court or administrative agency. Nor had it been suggested even by the plaintiffs in this lawsuit. Section 6 of the Charter was first injected into this suit when the District Court issued its opinion granting a preliminary injunction. An entirely different situation would have been presented if the Charter had been authoritatively construed by the state courts to require hiring the Housing Police as City policemen without examination, and the City thereafter kept minority group members in the Housing Police, rather than accord them clearly defined local rights to employment in the Police Department. In such circumstances, the contention that the City's reliance on civil service testing requirements was a pretext for racial discrimination would be far more substantial.

steered to it as an alternative to the Police Department, but that it was organized as an affirmative action program to provide minority employment opportunity.

42 U.S.C. §§ 1981 and 1983

The District Court premised liability under 42 U.S.C. §§ 1981 and 1983 upon its finding of a Title VII violation. Because we reject that conclusion, we also reject the Court's conclusion that the City violated these two statutes.

Model Cities Act

The threshold issue with respect to the claim under the Model Cities Act is whether appellees have a private right of action to enforce its provisions concerning employment status. Private rights of action under the Act have thus far been limited to suits seeking enforcement of the Act's requirements for citizen participation. *See, e.g., Economic Development Corp. v. Model Cities Agency,* 519 F.2d 740 (8th Cir. 1975); *Bouchard v. Washington,* 514 F.2d 824 (D.C. Cir. 1975). Whether or not the appellees' right to bring their claim for relief can be inferred directly from the Act, the Supreme Court has ruled that 42 U.S.C. § 1983 creates a private right of action for any claim that action has been taken under color of state law to deny a plaintiff a right secured by a federal statute. *Maine v. Thiboutot,* ___ U.S. ___ (June 25, 1980).

On the merits of the claim, the Model Cities Act requires programs funded under it to meet all additional requirements established by the Secretary of HUD. 42 U.S.C. § 3303(a)(6) (1976). CDA Letter Number 11, promulgated by the Secretary under this authority, required the City to provide full civil service status within two years of hiring, for members of the Housing Police,

since their jobs were originally funded by a Model Cities grant. As required by CDA Letter Number 11, the City endorsed the policy of the letter and adopted its requirements, recognizing its obligation to comply with those requirements in order to receive funds under the Act. Nevertheless, the City, without any justification, has failed to accord civil service status to the Housing Police.

The City's only defense to the appellees' claim to obtain their right to civil service status is an unpersuasive claim of laches, that appellees commenced this lawsuit in 1977, four years after the City was required to hire them as civil servants under the Act. We agree with the District Court that the four-year delay did not prejudice the City and did not indicate that the Housing Police had acquiesced in the City's violation. Consequently the defense of laches was not established. *See Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206, 215 (1963); 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2946 at 420 (1973).

While we affirm the District Court's ruling that the Housing Police members are entitled to civil service status, we think it is inappropriate for a federal court to attempt to determine the content of this state-created status. We therefore vacate all aspects of the District Court's remedy other than the bare requirement of civil service status. It appears that most, if not all, of the other aspects of the Court's remedy, including incorporation of the Housing Police members into the Police Department with equal pay and benefits, were designed to remedy the Title VII violation, which we have rejected. Upon remand, the District Court's decree should be limited to requiring civil service status for the appellees. Once that entitlement has been adjudicated, the

District Court should relinquish its jurisdiction (save only for any necessary compliance remedies) and remit appellees to the state courts in the event of any dispute as to the nature of the rights to which they are entitled as a result of civil service status. *Cf. Chance v. Board of Examiners*, 561 F.2d 1079 (2d Cir. 1977).

CETA

For purposes of considering appellees' claim under CETA, we will assume that *Maine v. Thiboutot, supra,* authorizes a private cause of action under § 1983 to remedy state action denials of rights under CETA, despite our previous decision in *CETA Workers' Organizing Committee v. City of New York*, 617 F.2d 926 (2d Cir. 1980), rejecting a private right of action implied directly by CETA. And we need not pause to consider whether, even under *Thiboutot*, a litigant suing under § 1983 to enforce obligations imposed by some other federal statute may be obliged to exhaust administrative remedies created by that other statute. In any event, appellees' CETA claim fails on its merits.

The CETA claim, upheld by the District Court, is that the City's maintenance of the civil service examination, as applied to the members of the Housing Police, constitutes an "artificial barrier to public employment" within the meaning of 29 U.S.C. § 824(f) (Supp. II 1978). We disagree. CETA defines "artificial barriers to employment" to mean "limitations in the hiring . . . and other terms and conditions of employment which are not directly related to an individual's fitness or ability to perform the duties required by the employment position." 29 U.S.C. § 802(3) (Supp. II 1978). As with the Title VII claim, there is no contention that the entry-level police exam is not directly related to the individ-

ual's fitness or ability to perform the duties of police officer. *Cf. DeLarmi v. Borough of Fort Lee*, 132 N.J. Super. 501, 334 A.2d 349 (App. Div. 1975) (rejecting similar challenge to civil service test under predecessor statute to CETA, Emergency Employment Act of 1971, 42 U.S.C. § 4876(c)(18)). The District Court found the test, even if job-related, to be an artificial barrier because of Section 6 of the City Charter, which the Court construed to dispense with civil service testing for the Housing Police members applying to the Police Department. As with the Title VII claim, even if the state courts should ultimately agree with this construction of local law, appellees would not thereby acquire enforceable rights under CETA.[10]

Conclusion

Having affirmed only so much of the District Court's remedy as provides for the appellees to be promptly accorded civil service status, with whatever benefits and protections accompany that status under local law, we vacate the judgment and remand for entry of a revised decree consistent with this opinion. No costs.

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10 In view of our rejection of the CETA claim on its merits, we also need not consider the City's contention, rejected by the District Court, that the obligation to remove "artificial barriers" is enforceable, if at all, only against the Secretary of Labor, on whom is placed the initial responsibility to assure that sponsors of CETA projects remove such barriers.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Filed Jan.29,1980
Clerk, U.S. District Court
Bridgeport, Conn.

MEMBERS OF THE BRIDGEPORT HOUSING AUTHORITY POLICE FORCE, ET AL,	:	
Plaintiffs	:	CIVIL
-vs-	:	B-77-130
CITY OF BRIDGEPORT, ET AL,	:	
Defendants	:	

MEMORANDUM OF DECISION

INTRODUCTION

This action is brought by the members of the Bridgeport Housing Authority Police Force against the City of Bridgeport and its Mayor, Director of Civil Service, Civil Service Commission, Superintendent of Police, Board of Police Commissioners, the Bridgeport Housing Authority, Director of the Housing Authority, the Bridgeport Area Manpower Consortium and its Director, the United States

Department of Labor, and the United States Department of Housing and Urban Development and its Secretary. Plaintiffs claim violations of 42 U.S.C. §§ 1981 and 1983; the Demonstration Cities and Metropolitan Development Act of 1966 (Model Cities), 42 U.S.C. §§ 3301 et seq.; Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq.; and the Comprehensive Employment and Training Act (CETA), as amended by the Comprehensive Employment and Training Act Amendments of 1978, P.L. 95-524, 92 Stat. 1909, 29 U.S.C. §§ 801-999. The Court has jurisdiction under 28 U.S.C. §§ 1331 and 1343. The plaintiffs seek a determination that the differences in terms and conditions of employment between their positions and those in the Bridgeport Police Department are illegal and unconstitutional. They have requested that the Court order them incorporated into the Bridgeport Police Department or desig-

nated a Housing Authority Police Force pursuant to Conn. Gen. Stat. §8-44b on a par with the Bridgeport Police Department, and accorded civil service status. They also seek damages, costs and attorney's fees.

After a hearing in February and March of 1979, this Court granted plaintiffs' motion for a preliminary injunction restraining the City's Employment and Training Administration from terminating four plaintiffs as CETA participants. After a hearing in September, 1979, on plaintiffs' motion for an injunction restraining the City from terminating plaintiffs on September 20 when their CETA eligibility expired, the Department of Labor granted a waiver of the eligibility requirements under CETA, which extended plaintiffs' eligibility for three months and the motion accordingly was withdrawn.

The Court granted plaintiffs' motion for a bifurcated trial, and the issue of liability was tried to the Court on December 11 and 14, 1979. By order of the Court, with the consent of the parties, the evidence received at the earlier preliminary injunction hearings was made part of the trial record.

FACTS

I. Administrative Remedies.

Plaintiffs filed administrative complaints under Title VII with the Equal Employment Opportunity Commission (EEOC) and the Connecticut Commission on Human Rights and Opportunities on or about August 19, 1976, and received their Notices of Right to Sue from the EEOC in April, 1978. PX 52-54.[1/] On June 9, 1978, plaintiffs

1/ "PX" refers to plaintiffs' exhibits, "DX" to defendants' exhibits. Live testimony is referred to by both date and page, where available.

received permission to amend their complaint to add allegations of Title VII violations.

Plaintiffs also sent a complaint to the Department of Housing and Urban Development (HUD) on May 30, 1978, calling HUD's attention in particular to the alleged Model Cities Act violations. PX 56. On the same day they sent a complaint to the City's Employment and Training Administration, calling its attention to the CETA violations. On May 14, 1979, plaintiffs complained again to the City's Employment and Training Administration, which still took no action. Accordingly, on July 25, 1979, plaintiffs by letter requested the Department of Labor to take jurisdiction of their complaint. The Department of Labor did not respond to plaintiffs' request; but the City, on August 9, 1979, purported to deny plaintiffs' complaint without a hearing. PX 55, 57-60. The Department of Labor has never responded to plaintiffs'

complaint of July 25, apparently because the official responsible for conducting the investigation never received it, although it was properly addressed and mailed. Testimony of Mr. Thompson, 12/11/79. As a result, the Department of Labor has never seen plaintiffs' complaint; and although it knew of the complaint when it received a copy of the City's response in August, at the time of trial it had not yet begun to investigate the complaint. Id.

Plaintiffs at this point do not have any effective administrative remedies, since they are threatened with termination of their employment and the Department of Labor has not even begun investigation of their eighteen-month old CETA complaint. Similarly, they have no effective administrative remedy under the Model Cities Act because HUD has not acted on their complaint and the City is no longer receiving Model Cities funds; the administrative

remedy of fund termination is thus unavailable as well as unhelpful to plaintiffs.

II. History of the Housing Police.

Bridgeport has seven public housing projects: P.T. Barnum, Marina Apartments, Father Panik Village, Marina Village, Harbor View, Fireside and Green Homes. All were constructed between 1940 and 1960 except Harbor View, which is approximately seven years old. P.T. Barnum, Marina Village, Green Homes and Father Panik Village are low income projects and are approximately 95% Black and Puerto Rican. The residents of Harbor View and Fireside are elderly and almost all white. The housing projects have a total pupulation of approximately twelve thousand, of which approximately ten thousand live in the low income projects.

All the housing projects are adminis tered by the Bridgeport Housing Authority,

which was established in 1949 according to Conn. Gen. Stat. § 8-40, and thereafter activated by the City of Bridgeport. Under state law, the Bridgeport Housing Authority is a public corporation created by the City of Bridgeport for the purpose of planning, creating and administering Bridgeport's housing projects. The housing projects that it creates and administers are part of the City of Bridgeport. Municipal services such as schools, fire protection, sanitation, and other services except police protection are provided by the City of Bridgeport in the same manner as for other regions of the City.

The Housing Police began full-fledged operation in 1970. Prior to that time a small number of persons were employed by the Housing Authority as guards. In 1970 a unit of twenty officers was established in Father Panik Village. Because of the

success of the initial group of officers the force was expanded to other projects, and the number of officers increased, reaching a high of 52 in 1974, when the last class of officers was hired. All previous classes had been hired between 1970 and 1973. No officers have been hired since 1974, and the Housing Police Force now consists of approximately twenty-seven officers.

Funding for the Housing Police in their early years came from a variety of sources, since 1971 primarily under the Model Cities Act. The Housing Authority, which is now and has been for some time operating on a deficit budget, provided an office but no money for salaries. By the time of expiration of the Model Cities Act in 1975, 42 U.S.C. §3311, Model Cities funds were being used to fund all the Housing Police positions. Upon the expiration of the Model Cities Act, the City assumed re-

sponsibility for funding the Housing Police for one year and then refused to continue them, claiming lack of resources in view of a municipal fiscal crisis. PX 39. With the exception of the three or four plaintiffs who have been funded by the Housing Authority[1a/] the plaintiffs were then funded as CETA participants, and they remained in this status, despite the assertions of City officials that CETA funding could only be a transitional funding source. Plaintiffs' funding under CETA has been supplemented by City funds received under the "block grant" provisions of the Community Development Act, 42 U.S.C. §§ 5301 et seq.. Plaintiffs' CETA eligibility has now expired, as of December 31, 1979, and the Housing Authority does not have, nor has it ever had, funds to pay their salaries. The three or four plaintiffs paid by the Housing Authority will continue to be so paid through

1a/ It is not clear from the record when the Housing Authority began funding these three or four positions.

September, 1980; the remainder are presently being paid by the City out of HUD block grant funds. The City, however, has indicated no intention of giving plaintiffs' positions a permanent place in its budget, despite the fact that it is now operating with a budget surplus rather than in a fiscal crisis.

III. Duties of the Housing Police.

The Housing Police perform the duties of police officers within their beat, the City's housing projects. Their duties are identical to those of a Bridgeport Police Department Patrol officer and include investigation of crime, apprehension of suspects, maintenance of order, and so forth; their arrest powers, however, are presently limited, due to their classification by the City as "special police." The duties performed by the Housing Police require the same skill, effort and responsibility as those of the

Bridgeport Police Department Patrol officers, and are performed under similar working conditions, except that plaintiffs have an exceptionally difficult and dangerous assignment. The housing projects are low income and high crime areas. Violent crimes, such as robbery and murder, and narcotics offenses occur several times more frequently in the housing projects than in the rest of the City. PX 74 at 33-4.

The Housing Police have received training equal to that of Bridgeport Police Officers. All the Housing Police classes but one received training equal in length and content to that of the Bridgeport Police Department trainees, and in some cases in the same classes. The Housing Police officers in one class were put into the field after a shorter training course because they were urgently needed. They have learned from

on the job training and experience, and have received certificates from the State of Connecticut certifying their completion of 1000 hours of on the job training. They perform with competence equal to that of their fellow Housing Officers and Bridgeport Police officers. Testimony on the matter at trial was unanimous that plaintiffs do the same work as any other patrol officers in the City of Bridgeport and do it very well. The witnesses agreed that plaintiffs' work was excellent.

Iv. Supervision and Control of the Housing Police.

The Housing Police are supervised and controlled by the Bridgeport Police Department. They are under the command of a Bridgeport Police Department Sergeant, who reports to his superiors within the Bridgeport Police Department. It is from the Sergeant, and thus from the Bridgeport Police Department, that the Housing

Police receive orders, assignments, supervision, control and discipline, including suspension and discharge. They are subjected to supervision, control and discipline under the same terms and according to the same standards as Bridgeport Police Department officers.[2/]

The Housing Police were determined by the State Labor Board to be employees of the Housing Authority, with whom they were negotiating a contract at the time, for purposes of bargaining. City of Bridgeport v. Bridgeport Housing Police Local 1303, Case No. MPP-3081, Decision No. 1492 (Conn. Bd. of Labor Relations, Feb. 1, 1977), appeal dismissed, No. 115665 (C.P.

2/ See, e.g., PX 24, a series of orders issued by Bridgeport Police Department Sergeant Cafferty regulating procedures for writing reports, fueling police cars, and reporting cases of sickness or injury; PX 67 regarding Housing Police time off. See also testimony of Sgt. Cafferty 12/11/79.

Fairfield Cty., Jan. 31, 1978). However, the Housing Authority has no control over the wages paid plaintiffs, the amounts of which have always been and still are determined by the City. The Housing Authority has agreed that plaintiffs should be paid in parity with Bridgeport Police Department officers, but this agreement has no effect since the Housing Authority does not determine wage rates. PX 69.

The City of Bridgeport thus exercises control over every meaningful aspect of plaintiffs' employment. The Housing Authority, for some purposes the plaintiffs' nominal employer, does not even issue their pay checks.

V. Service by the Housing Authority Police.

The Housing Police have received rare unanimity of praise from the community they serve, the Bridgeport Police Department officers they work with, City officials,

and Housing Authority officials. They are universally recognized as having worked a tremendous improvement in the lives and physical safety of the housing projects. They are viewed as essential by the residents, the Housing Authority officials, and City officials.

Replacement of the Housing Police by Bridgeport police Department officers is not feasible for three reasons. First, the Bridgeport Police Department is now understaffed; Superintendent Walsh testified in September that its strength was 401, compared with an authorized strength of 498 and a budgeted strength of 458 (9/21/79 at 104-5). Attrition continues and the current appointment list has expired, which means that it would be at least a year before new officers could be appointed (2/21/79 at 86 et seq.). These officers would then have to undergo a full training course before being assigned. Realistically,

then, new personnel would not be available until the middle of 1981 at the earliest, and the City has not indicated any intention even to begin the hiring process, so that assignment of newly hired officers probably would be delayed even further.

Second, community residents and Housing Authority officials agree that the Bridgeport Police Department would be most unlikely to provide adequate police protection for the housing projects. Before the Housing Police were formed, the Bridgeport Police Department officers rarely entered the housing projects, and problems in obtaining assistance from them have continued. See, e.g., PX 37. During a two-week work stoppage by the Housing Police, the Bridgeport Police Department attempted to police the projects, but according to community residents they were unable and even unwilling

to patrol or respond to complaints, even when gunfire occurred in the streets of the projects.

Third, the Housing Police have developed an irreplaceable expertise about and knowledge of the community they serve. Their familiarity and rapport with the residents of the projects makes their continued employment necessary to efficient law enforcement. Mayor Mandanici has referred to the Housing Police as a "needed service," and acknowledged that their elimination would result in an "escalation in the incidence of crime." PX 39. See also PX 21 (comparison of housing projects before and after formation of Housing Police).

IV. The City's Actions.

A. Housing Police conditions of employment. The Housing Police receive substantially lower pay than Bridgeport Police officers. They have fewer fringe

benefits and no effective retirement plan; while the Bridgeport Police Department has generous provisions for retirement after twenty years of service. They have almost no opportunity for promotion, since the highest Housing Authority position is supervisor, a position subordinate to a Bridgeport Police Department Sergeant. The Housing Police have no job security; no Bridgeport Police Department officer has ever been permanently terminated for lack of funding, at least within the forty-year tenure of Police Superintendent Walsh. (9/21/79 at 100.)

B. Racial composition of the Housing Police and the Bridgeport Police Department. The Housing Police are all Black or Puerto Rican. The Bridgeport Police Department is approximately 87% white and 13% minority (Black and Hispanic) (9/21/79 at 89.) The City of Bridgeport is approximately 41% minority

and 59% white. PX 81 at 98.

These disparities arose because the Bridgeport Police Department for many years excluded minorities from their ranks through practices that did not end until after almost all the plaintiffs were hired onto the Housing Police. The Housing Police, by contrast, were hired in conformity with the procedures mandated by the Model Cities Act, including affirmative action and preference for residents of model cities neighborhoods. Thus most of the plaintiffs were excluded from Bridgeport Police Department jobs when they looked for employment as police officers, and they accepted the jobs that were then available as Housing Police.

After nearly all the plaintiffs were hired, the Bridgeport Police Department recruited minority officers because it was required to do so by order of this Court in Bridgeport Guardians v. Board of Civil

Service Commissioners, 354 F. Supp. 785 (D. Conn.) aff'd in part & rev'd in part, 482 F.2d 1333 (2d Cir. 1973), cert. denied, 421 U.S. 991 (1975). Tests were given in 1974 and 1977, and half the officers hired since 1974 have been minority.

Plaintiffs, however, at no time have been offered employment in the Bridgeport Police Department, except in cases in which they scored so high on the tests given in 1974 and 1977 that they were eligible for appointment as members of the general public.

C. Matters Relevant to the Model Cities Act, 42 U.S.C. §3301 et seq. Beginning in 1971, all the Housing Police positions were funded in whole or in part by supplemental or other HUD funds. The City formally endorsed and adopted the requirements and policies of CDA Letter

Number 11[3/] by resolution of the City's Common Council on April 22, 1971. The City, in addition to agreeing to abide by and implement CDA 11, included in at least one of its contracts with the Housing Authority regarding funding for the Housing Police a provision that CDA 11 was mandatory. PX 28, 29. Hiring for the Housing Police was conducted in accordance with CDA 11, under the supervision of the Bridgeport Police Department.

The City has not incorporated plaintiffs' jobs into its regular civil service system. It has, instead, asserted that it was attempting to resolve the problem of the permanent status of the Housing Police, but has failed to do so.

3/ The pertinent language of this regulation is set out in the text in connection with the discussion of standing under the Model Cities Act, infra.

The Housing Authority's efforts under CDA 11 do not seem to have been much more strenuous than the City's. The Housing Authority did resolve to establish a Housing Authority Police Force under Conn. Gen. Stat § 8-44b; but its efforts to comply with the Model Cities requirements seem to have stopped there. The record does not reveal any attempts on the part of the Housing Authority to negotiate with the City in order to effectuate its resolution.

In addition to agreeing to comply with CDA 11 as part of its agreement with HUD under the Model Cities Act, the City made additional agreements with HUD. It specifically agreed that it retains responsibility for providing municipal services to the housing projects, including fire, police and schools, and has contracted with HUD that the City will provide these services.

(Testimony of Mr. Heyward, 12/11/79.)

D. Matters relevant to CETA. The City has taken no action to eliminate artificial barriers to employment, including civil service tests, for plaintiffs. Since plaintiffs have proven themselves as Bridgeport Police officers by performing skillfully for as many as ten years, at this point a civil service test requirement, whether or not legal,[4/] is wholly artificial.

E. Matters relevant to Title VII. All the Housing Police are Black or Puerto Rican. Superintendent Walsh testified that of the 400 Bridgeport Police Department officers, 52, or approximately 13%, are minority. Since in addition there are approximately 27 Housing Police officers, termination of all the Housing Police officers would reduce the number of the City's minority police officers by 34% literally overnight.

4/ See text acc. nn.20-21 infra.

Although all the persons terminated would be minority, not every minority police officer would be terminated, since some Bridgeport Police Department officers are minority. The classification of police officers into Housing Police officers and Bridgeport Police Department officers nevertheless has a severe disparate impact on minorities, in that no whites are now adversely affected by the classification. The City is fully aware of the racial impact of its classification. It has suggested no legitimate ends of public policy that the classification and the unfavorable treatment of the Housing Police might serve. On the contrary, the only apparent reason for the less favorable pay and conditions of the Housing Police is the weak economic position of minorities, which enables the City to hire them at below-market wages.

F. Additional evidence of discrimination. The City's employment practices with respect to its Housing Police were condemned by its own affirmative action plan statement as long ago as 1976. That plan found it to be an instance of the City's deficient employment practices toward minorities that "the City has failed to provide an acceptable conduit and supportive procedure to channel these qualified [Housing Police officers] into the regular police force." PX 81 at 106.

This Court has previously found that the City has a deplorable reputation for racial discrimination in employment. Association Against Discrimination in Employment v. Bridgeport, 454 F. Supp. 751, 757 (D. Conn.), vacated and remanded, 594 F.2d 306 (2d Cir.), opinion on remand, 479 F. Supp. 101 (D. Conn. Aug. 24, 1979).

Although the City has asserted that its rules require that plaintiffs take a

civil service test, in competition with the general public, to become Bridgeport Police Department officers, the City in the case of a white employee did not enforce such a requirement. In 1957 it hired one Florence Jepson as a "police investigator." The evidence does not reveal all of Mrs. Jepson's duties, but it appears that for at least part of her tenure as an investigator she worked as a jail matron. Twelve years later, the City created the position of police woman and gave a competitive examination for that job. Mrs. Jepson was ineligible to take the 1969 test because of her age, and she did not take the test. She nevertheless was given the position of police woman, which entailed a substantial salary increase from her former job and a change of duties from work as a matron to the full range of police officer duties.

Plaintiffs have not been accorded the same opportunity to become police officers without taking a test. The City's claim that Mrs. Jepson's case is distinguishable because she was ineligible to take the 1969 test does not in fact justify the difference in treatment since the City would hardly claim that if plaintiffs were ineligible to take the police officer test they would therefore automatically be made police officers. In fact one of the plaintiffs, Frank Davis, was disqualified from taking the 1974 police officer test because he was over age, DX 502, but the City has not made him a Bridgeport Police Department officer. The City claims also that Mrs. Jepson was offered the position of police woman because its duties were similar to those of her prior position. But it appears that the Housing Police perform duties at least similar to those performed by Bridge-

port Police Department officers as did Mrs. Jepson.

These factors and the matters reviewed above, along with the City's blatant disregard for its own civil service rules[5/] and CDA 11, which it specifically endorsed and agreed to follow, leave the Court no alternative to the conclusion that the City has acted intentionally and in bad faith.

CONCLUSIONS OF LAW

I. Implication of a Private Right of Action and Standing.

A. The Model Cities Act.

Cort v. Ash, 422 U.S. 66 (1975) established the following criteria for implication of a private right of action: (1) Is the plaintiff among the class for whose particular benefit the statute was created? (2) Is there any

5/ See id.

indication of legislative intent either to create or to deny a private right of action? (3) Is implication of a private remedy consistent with the underlying legislative scheme? (4) Is the cause of action one traditionally relegated to state law? 422 U.S. at 78.

(1) Are the plaintiffs among the class for whose particular benefit the statute was created? Among the stated purposes of the Model Cities Act were the implementation of programs to alleviate "the concentration of persons of low income in older urban areas" by increasing cities' supplies "of adequate housing for low and moderate-income people," and in particular "to expand housing, job, and income opportunities" for such persons and in such areas. 42 U.S.C.§ 3301. The statute also provided that to be eligible for federal assistance under the Act, a city's plan must provide "maximum opportunities

for employing residents of the area in all phases of the program and enlarged opportunities for work and training... [and] make marked progress in reducing... under-employment and enforced idleness ...." 42 U.S.C. §3303(a)(2). The statute authorizes the Secretary of HUD to establish "additional requirements... related and essential to the provisions of" the Act. 42 U.S.C. § 3303(a)(6).

Perhaps realizing that Congress's exhortations might be of little assistance to the beneficiaries of the Model Cities Act without further specification, the Secretary promulgated CDA (Community Development Act) Letter Number 11 in November, 1970. This regulatory letter, entitled "Model Cities Resident Employment and Training Requirements," sets forth HUD requirements under § 103(a) of the Model Cities Act, 42 U.S.C. §3303(a). CDA 11 § 2c provides:

> In the case of public employment generated in components of the comprehensive city demonstration program, financed in whole or in part by supplemental or other HUD funds, such jobs will be incorporated into the community's regular civil service system within a reasonable period of time not to exceed two years from the point that positions were filled. Actions to accomplish this will be initiated in each community within six months of the date of issuance of this Letter. Such positions will be filled through a Model Neighborhood resident recruitment and training system in conformity with the policies of this Letter and the positions will carry full public employee rights and benefits.

It appears quite clear to the Court that § 2c is "related and essential" to the purposes of 42 U.S.C. §§ 3301 and 3303(a), and therefore is within the authority delegated to the Secretary by § 3303(a)(6). Without the requirement of CDA 11 that cities assimilate public employees hired under the Act into the regular civil service system, the statute's goal of providing "enlarged opportunities for work and training [and]...reducing...under-employment"

would likely be met only temporarily if at all.

If the statute itself left any doubt that plaintiffs here are intended beneficiaries of the Model Cities Act, CDA 11 clearly resolves any such doubts in the plaintiffs' favor. And the evidence clearly establishes that the hiring and funding procedures followed in this case made CDA 11 § 2c applicable. See, e.g., PX 26-29.

(2) Is there any indication of legislative intent either to create or to deny a private right of action? There is little evidence in the statute itself of any legislative intent to create a specific right of action on the part of persons in the situation of the plaintiffs in this case. However, there is no evidence of any intent to deny a private right of action either. But as in Cannon v. University of Chicago, 47 U.S.L.W. 4549

(1979), common sense seems to suggest implication of a private right, especially in the posture of this case. The only administrative remedy available under the Act was the termination of federal funds, a draconian measure that would surely harm the intended beneficiaries of the Act as much as the non-complying recipients of the funds. Such a remedy usually will be invoked only in response to the most egregious violations of the statute; a private remedy is therefore necessary as a less drastic and often more efficient means of enforcing the statute. And in this case the administrative remedy is unavailable, since the Model Cities Act has expired, making termination of funds an empty threat. Accordingly, I conclude that this second requirement for implication of a private right of action is met in this case.

(3) Is implication of a private right

consistent with the underlying legislative scheme? The factors cited above in support of the conclusion that the first two criteria have been satisfied in this case apply with equal force here, and I conclude that implication of a private right here is wholly consistent with the underlying purposes of the legislative scheme.

(4) Is the cause of action one traditionally relegated to state law? The answer in this case is clearly negative. The areas of civil rights and employment discrimination are hardly areas of the law that traditionally have been relegated to state law. The traditional source of the rights asserted by the plaintiffs in this case has been the fourteenth amendment to the United States Constitution and later, as evidenced by this suit, federal statute.

In view of the foregoing discussion, plaintiffs have standing to sue under the Model Cities Act. See also Economic

Development Corp. v. Model Cities Agency, 519 F.2d 740, 743 (8th Cir. 1975); Bouchard v. Washington, 514 F.2d 824 (D.C. Cir. 1975); North City Area-Wide Council, Inc. v. Romney, 428 F.2d 754, 757 (3d Cir. 1970); Feliciano v. Romney, 363 F. Supp. 656, 670-2 (S.D.N.Y. 1973). There can be no doubt that plaintiffs have suffered and are suffering injury in fact as a result of defendants' actions. See Association of Data Processing Serv. Organizations v. Camp, 397 U.S. 150 (1970).

B. CETA. The discussion above concerning the Model Cities Act applies with equal force to CETA,[6/] but additionally is buttressed by the following statutory provision.

> The existence of remedies under this section shall not preclude any person, who alleges that an action of a prime sponsor or of any other recipient violates any of the provisions of the

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6/ For the text of the pertinent section, see n.15 infra.

> chapter or the regulations promulgated under the chapter, from instituting a civil action or pursuing any other remedies authorized under federal, state, or local law.

29 U.S.C. §816(1). See also Hark v. Dragon, No. 74-329 Slip. Op. at 199(2d Cir., Oct. 26, 1979).

II. Laches and Time limitations.

A. Laches. The City claims that plaintiffs are barred by laches from asserting any claims under the Model Cities Act. The Court finds this argument unconvincing. The elements of the laches defense are delay and acquiescence by the plaintiff, and prejudice to the defendant. See 11 Wright & Miller, Federal Practice and Procedure: Civil § 2946 at 420 (1973). The City began receiving Model Cities funds for the Housing Police in 1971, and CDA 11 allowed it well into 1973 to incorporate the plaintiffs' positions into the regular civil service system. The delay, then, between the accrual of plaintiffs'

cause of action and the filing of this suit is at most four years. During those four years the City first acquired Model Cities funds with which to pay the plaintiffs, then in 1975 funded them itself, and in 1976 obtained CETA funding for them. The use of CETA funds, approximately 3 years after plaintiffs' cause of action accrued, resulted from the City's determination that it was no longer financially able to pay the plaintiffs.

Even if a four-year delay can be considered significant enough to support a defense of laches (assuming the other conditions of the defense were met), plaintiffs' failure to sue earlier may have resulted just as well from the realization that one cannot draw blood from a stone as from acquiescence. And indeed, the City has not pointed to any signs of acquiescence by the plaintiffs.

The third requirement for a finding of laches is prejudice to the defendant. Here the defendant has not made any specific claims of prejudice. The City may actually have cause to be pleased with the delay, since the number of Housing Police at the institution of this action was (and is now) little over half their number in 1974, and the intervening time gave the City a greater opportunity to devise a plan conforming to the requirements of the Model Cities Act if it were so inclined.

Accordingly, since I am not at all persuaded (a) that any delay here is sufficiently significant to support the defense of laches, or (b) that the plaintiffs acquiesced in any of the defendants' violations of their statutory and constitutional responsibilities, or (c) that the defendants were prejudiced in any way, I conclude that plaintiffs case is not barred by laches.

B. Time Limitations Under Title VII.[7] The City claims that plaintiffs are barred from presenting any claims under

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7/ 42 U.S.C. §2000e-5 provides as follows:

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed [with the Commission]...by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law.....

(d) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless

Title VII that arose more than 180 days prior to April 20, 1978, the date plaintiffs received their right-to sue letters from EEOC. The basis of this assertion remains obscure. Plaintiffs alleging an unlawful employment practice that occurred in a

7/ (cont.)

a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(f)(1)...If a charge filed with the Commission...is dismissed by the Commission or if within one hundred and eighty days from the filing of such charge or the expiration of any period of

state which has a State...law prohibiting the ...practice and establishing or authorizing a State...authority to grant or seek relief from such practice," 42 U.S.C. § 2000e-5(c), have a minimum of 21 months from the occurrence of the alleged act of discrimination in which to file suit. This period is computed as follows:

7/ (cont.)

reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

Within 300 days of the alleged incident the plaintiff must file a complaint with the EEOC, having filed a complaint with the appropriate state agency at least 60 days earlier.[8] 42 U.S.C. §20003-5(e). The Commission then notifies the state agency of the complaint and allows the state agency at least 60 days to act on the complaint. 42 U.S.C. §2000e-5(d). Then if the Commission has not resolved the matter or instituted suit within 180 says of the period allowed the state agency, [9] it must notify the person aggrieved, who then has 90 days within which to file suit. 42 U.S.C. §2000e-5(f)(1).

8/ Simultaneous filing, as in this case, is permitted so long as the EEOC defers to the state agency for the appropriate period. Love v. Pullman Co., 401 U.S. 522 (1972). This Court deems the EEOC's issuance of a right to sue letter its certification that it has complied with all statutory and regulatory prerequisites to issuance of the letter, including the required deference to the state agency.

9/ This period starts to run at the time of filing if there is no appropriate state agency.

With respect to the City's argument, there is nothing in the statute to suggest a bar to claims arising more than 180 days from receipt of the right to sue letter. Rather, the period between filing with the EEOC and receipt of the right to sue letter will vary from case to case; it is in most cases wholly out of the aggrieved person's control, and so neither can nor does constitute a statute of limitations.[10/] The limitation periods, rather, are the 300-day period within which one must file with the EEOC, and the 90-day period within which one must file suit. Plaintiffs' amendment of their complaint to include the Title VII claims was within the 90-day period.

10/ A plaintiff whose own actions are responsible for the unreasonable extension of this period may, however, be barred by laches. See Boone v. Mechanical Specialties Co., No. 77-3999 (9th Cir., Dec. 14, 1979) (plaintiff's refusal of right to sue letter and of EEOC assistance for seven years held to constitute laches).

As to the 300-day period, I cannot conclude that § 2000e-5 bars any portion of plaintiffs' claims, at least so far as the issue of liability is concerned. It is the law of this Circuit that "a plaintiff may defeat a time bar to a Title VII suit by asserting subsequent identifiable acts of discrimination related to a time barred incident." Smith v. American President Lines, Ltd., 571 F.2d 102, 105 (2d Cir. 1978), citing Egleston v. State Univ. College at Geneseo, 535 F.2d 752 (2d Cir. 1976); Noble v. Univ. of Rochester, 535 F.2d 756 (2d Cir. 1976); Weise v. Syracuse Univ., 522 F.2d 397 (2d Cir. 1975). The Court in Smith held untimely a filing with the EEOC over 11 months after the alleged act of discrimination occurred. Plaintiff argued there that the occurrence of further discriminatory acts after the filing cured the untimeliness. The court rejected this

argument because the plaintiff had neither filed an amended charge to cover the subsequent acts not "filed an initial charge within the time frame of § 2000e-5(e) as to certain enumerated acts within an alleged discriminatory pattern." 571 F.2d 102 at 105. The instant case, on the other hand, involves an ongoing practice of discrimination. It thus presents a situation analagous to that in Egelston v. State Univ. College at Geneseo, supra, where the court held timely an EEOC filing eight months after the plaintiff received notice of her allegedly discriminatory termination, where plaintiff continued working for defendant at an allegedly discriminatory rate of pay, through the date of filing with the EEOC.[11/]

11/ The court relied alternatively on the alleged continuing acts of discrimination and on the fact that plaintiff's discharge was not consummated when she received notice that her contract would not be renewed but at the later time (which was within the period prescribed by §2000e-5(e)) when her contract expired.

The policy of discrimination in this case existed both before and within the 300 day period prescribed by §2000e-5(e). The plaintiffs' filing with the EEOC therefore was timely. Furthermore, it encompasses the manifestations of discriminatory practice that occurred more than 300 days before the filing since the discrimination here constitutes a continuing violation of Title VII. Acha v. Beame, 570 F.2d 57, 64 (2d Cir. 1978); Weise v. Syracuse, supra, 522 F.2d at 412-12; see also Guardians Ass'n. v. Civil Serv. Comm'n., 466 F. Supp. 1273, 1278-80 (S.D.N.Y. 1979). The City, of course, is not liable for violations of Title VII that occurred before March 24, 1972, the date Title VII became applicable to municipalities. See Hazelwood School Dist. v. United States, 433 U.S. 299, 309 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324, 356-7 (1977); Acha v. Beame,

supra; Guardians, supra, 466 F. Supp. at 1376-7. Proof of pre-1972 discrimination, however, is admissible in support of an inference that the discrimination continued, Hazelwood School Dist., supra, 433 U.S. at 309n.15; and the City may be liable for post-1972 perpetuation of pre-1972 discrimination. Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971). Back pay liability, however, "shall not accrue from a date more than two years prior to the filing of a charge with the Commission." 42 U.S.C. §2000e-5(g).

C. 42 U.S.C. §§ 1983. The defendants maintain that plaintiffs' claims under these statutory provisions arising before April 25, 1974, are barred by the statute of limitations. This Court must look for the relevant limit to the most clearly analogous period of limitations provided by State law. Johnson v. Railway Express Agency, 421 U.S. 454, 462 (1975). Connec-

ticut's three-year tort statute of limitations, Conn. Gen. Stat § 52-577, applies to civil rights actions. Williams v. Walsh, 558 F.2d 667, 670 (2d Cir. 1977). However, since this case involves a course of discrimination continuing into the statutory period, the statute does not bar plaintiffs' claims under 42 U.S.C. §§ 1981 and 1983. Williams v. Norfolk & Western Ry. Co., 520 F.2d 539, 542 (4th Cir. 1975); Macklin v. Spector Freight Systems, Inc., 478 F.2d 979, 994 (D.C. Cir. 1973) (Wright, J.); Woodard v. Virginia Bd. of Bar Examiners, 420 F. Supp. 211, 214 n.3 (E.D.Va. 1976).12/

III. The Federal Defendants. (The United States Department of Labor, the United States Department of Housing and Urban Development and their Secretaries).

12/ It may be that although the suit is not barred, the statute limits the scope of the remedy available. But this inquiry can await

Plaintiffs admitted that the federal defendants are guilty of no wrongdoing, and have introduced no evidence tending to show any liability on the part of these defendants. Accordingly, the Court finds for the federal defendants on all counts of the complaint.

IV. The Bridgeport Housing Authority.

A. Title VII and 42 U.S.C. §§ 1981 & 1983. Assuming arguendo that the Bridgeport Housing Authority is an employer of the plaintiffs for the purpose of Title VII analysis, cf. 42 U.S.C. §2000e(a) and (b), it is difficult to see any theory on which the Housing Authority can be held liable under the statute. Plaintiffs have not pointed to any other employees of the Housing Authority with whom to compare the plaintiffs for purposes of either disparate

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12/ (cont.)
the Court's opinion on the remedy phase of the case.

treatment or disparate impact analysis. See International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-6 n.15 (1977). It is therefore impossible to find the Housing Authority liable under Title VII. 42 U.S.C. §1981[13/] clearly bars employment discrimination, see, e.g., Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), and a showing of disparate impact, Teamsters, supra, establishes a prima facie case, Davis v. Los Angeles County, 566 F.2d 1334 (9th Cir. 1977), vacated as moot 47 U.S.L.W. 4317 (1979). But difficulty similar to

13/ All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to do no other.

the Title VII problem arises under this statute. It seems clear that plaintiffs have suffered a deprivation of their rights violative of §1981; but they have not shown that the Housing Authority is sufficiently responsible for the violation to be liable under that section of §1983.[14/] The parties all acknowledge that the State Labor Board determined the Housing Authority to be plaintiffs' employer, at least for collective bargaining purposes; but the evidence shows that virtually all control over plaintiffs' terms and conditions of employment lies with the City rather than with the Housing Authority. The Housing

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14/ Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Authority, therefore, is incapable of actually discriminating against the plaintiffs; and plaintiffs have offered no evidence of either intent or attempts on the part of the Housing Authority or its officers to discriminate or otherwise to deprive plaintiffs of their rights. In fact, the Housing Authority did resolve at one point to establish a housing authority police force pursuant to state law, a proposal that if implemented might have bettered the plaintiffs' position. It does not appear from the evidence whether the Housing Authority's failure to do more on the plaintiffs' behalf was the result of inertia or animus. But in the absence of such evidence the Court will not make the inferences that would be necessary to plaintiffs' case. Accordingly, on the claims based on 42 U.S.C. §§ 1981 and 1983, the Court finds for the Housing Authority.

B. CETA. Plaintiffs rely for their CETA claim on §122(f) of the Act, 29 U.S.C. §824(f).[15/] The clear import of this section seems to be to place a burden on the Secretary of Labor and on "prime sponsors" under the Act. There is no evidence in this case that the Housing Authority is a prime sponsor as defined in §10(a) of the Act, 29 U.S.C. §811(a), and the plaintiffs have suggested no other basis for holding the Housing Authority liable under CETA. Accordingly on the CETA claim, the Court finds for the Housing Authority.

15/ The Secretary shall assure that prime sponsors have undertaken, or will undertake, analyses and reevaluations of job descriptions and where feasible, revisions of qualification requirements at all levels of employment, including civil service requirements and practices relating thereto, in accordance with regulations prescribed by the Secretary, with a view toward removing artificial barriers to public employment (as defined in section 802 of this title) of those whom it is the purpose of this chapter to assist.

C. Model Cities. The facts pertinent to the Housing Authority's obligations under the Model Cities Act have been set out above. Of particular importance is the reference in the Housing Authority's Model Cities Contracts with the City to CDA 11. The contracts appear to place the burden of compliance with CDA 11 and other relevant laws and regulations on the Housing Authority. This was in spite of the fact that the Housing Authority's power actually to effect compliance with the regulation has always been dubious at best, since the Housing Authority has no control over the City's Civil Service Commission, no power to enact the controlling city ordinances, and no money with which to ensure equal treatment of the Housing Police. Nevertheless, the Housing Authority bound itself, if it was not already so bound simply by the existence of the regulation,

to attempt compliance with CDA 11. Furthermore, I consider the findings of the State Board of Labor Relations in City of Bridgeport v. Housing Police Local 1303, Case No. MPP-3081, Dec. No. 14 (Feb. 1, 1977), appeal dismissed, No. 115665 (C.P. Jan. 31, 1978), persuasive, if not binding as a matter of law, that the Housing Authority at least at some relevant times held itself out to be and was an employer of the Housing Police. I conclude that as such, the Housing Authority had a duty at least to attempt to effect compliance with CDA 11. I conclude that the Housing Authority is liable to the plaintiffs for its failure to make any significant such attempts.

V. The City of Bridgeport and its Officers.

A. Title VII [16] Section 703(a) of

16/ Plaintiffs have satisfied the jursictional prerequisites to suit under Title VII, having filed complaints with the Connecticut Commission

Title VII, 42 U.S.C. §2000e-2(a) makes it unlawful for an employer

> (1)...to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color,... or national origin; or
>
> (2) to limit, segregate, or classify his employees...in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color,... or national origin.

Title VII outlaws two fundamental types of discrimination: employment policies that have a "disparate impact" on minorities and those that constitute "disparate treatment."

> [In disparate treatment cases, t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred

16/ (cont.)

on Human Rights and Opportunities and the EEOC in August 1976 and received their Notice of Right to Sue in April 1978.

> from the mere fact of differences in treatment....
>
> [Disparate impact cases] involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity ....Proof of discriminatory motive...is not required under a discriminatory impact theory.

International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-6 n.15 (1977).

Under both theories plaintiffs have the initial burden of proving a prima facie case. In a disparate impact case, "a plaintiff need only show that the facially neutral standards in question...are discriminatory in effect...." Dothard v. Rawlinson, 422, U.S. 321, 329 (1977). The defendant may rebut by proving that "the challenged requirements are job related...."17/

17/ The plaintiff may over come this rebuttal by showing "that other selection devices without a similar discriminatory effect would also 'serve the employer's legitimate interest in "efficient

Under a disparate treatment theory a plaintiff's prima facie case consists of a showing that the defendant "purposefully treated [minorities] less favorably than white persons," Teamsters, supra, 431 U.S. at 335, or a showing of disparity between the treatment of minorities and the treatment their qualifications would lead one to expect. Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978).[18/]

17/ (cont.)

and trustworthy workmanship.'" Id., quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). See also Griggs v. Duke Power Co., 401 U.S. 424, 532 (1971).

18/ In Furnco, 438 U.S. at 757, the court endorsed the following statement of the prima facie case from McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (footnote omitted):

> [Plaintiff must show] (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his

This prima facie showing raises an inference of discriminatory motivation. 438 U.S. at 577. The defendant may rebut the plaintiffs' prima facie case by showing a non-discriminatory reason for its actions that sufficiently dispels any inference of discriminatory motivation. Id.

I. Disparate Impact

The Disparity. The essence of plaintiffs' claim of disparate impact is that the classification of police officers in Bridgeport into Bridgeport Police Department officers and Housing Police officers has a discriminatory impact on minorities. The members of the Bridgeport Police Department have job security and opportunities for promotion,

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17/ (cont.)

> qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Of course the instant case is not a hiring case, as were Furnco and McDonnell-Douglas, but the foundations of the analyses are the same.

and receive higher pay and better benefits; the Housing Police receive lower pay and fewer benefits, and have little opportunity for promotion and no job security. The disproportionate impact of the job classification on minorities is clear: all of the Housing Police are minorities, whereas 87% of the members of the Bridgeport Police Department are white.

The City claims that (1) the distinction is one of employment status and not of race, in that plaintiffs' jobs are different and are not within the City's civil service system as are the Police Department positions; and (2) the Housing Police cannot validly be compared to the Bridgeport Police Department officers because the Housing Police are not "employees" of the City within the meaning of Title VII. See 42 U.S.C. §2000e(b) and (f). The facts as established at trial and enumerated above, however, clearly demonstrate the errors in the City's position.

a. The Housing Police are employees of the City. Section 701(f) of the Act, 42 U.S.C. §2000e(f), defines an employee as "an individual employed by an employer." In the absence of any further direction from the statute or its legislative history, the Court will construe those terms in accordance with common law principles. Smith v. Dutra Trucking Co., 410 F. Supp. 513, 516 (ND. Cal. 1976), aff'd 580 F.2d 1054 (9th Cir. 1978). The essential characteristic of the employer-employee relationship is the employer's power or right to control the employee's conduct. Id., citing NLRB v. Phoenix Life Ins. Co., 167 F.2d 983, 986 (7th Cir.), cert. denied, 335 U.S. 845 (1948). The selection or hiring of the employee, power of dismissal, and payment of wages are also relevant factors. 53 Am. Jur.2d Master & Servant §2 (1970). It is clear from the facts set out above that the City is the plaintiffs'

employer; it determines and pays their salaries, controls their conduct on the job, directs their assignments and alone possesses the power to fire them.[19]/

The City has argued that the State Labor Board's conclusion in City of Bridgeport v. Bridgeport Housing Police Local 1303, supra, that the Housing Authority was plaintiffs' employer is dispositive of this issue. This argument is unpersuasive. First of all, there is nothing in Title VII to suggest that Congress had any intention of deferring to such determinations by state agencies. Indeed, such deference could soon emasculate Title VII by giving state and local governmental units the power to define themselves out of its scope.

19/ The Housing Authority's negotiations with the Housing Police and "agreement" to pay them wages equal to those of the Bridgeport Police Department officers hardly suggest what the City maintains, that the Housing Authority should be considered the sole employer of the Housing Police to the exclusion of the City when it is the City that possesses complete control over the plaintiff's wages.

Second, the State Labor Board apparently relied for its decision in part on the provision of Conn. Gen. Stat. §8-44b that the members of a Housing Authority Police Force "shall be the employees of such housing authority." This provision, however, is irrelevant to the status of the Housing Police, because the Housing Police force was not created pursuant to the state statute. Rather, the plaintiffs are "special police officers" on the payroll of and under the control of the City. Moreover, even if the Housing Police were a §8-44b Force, the supremacy clause would subordinate the provisions of the state statute to conflicting provisions of Title VII.

Third, the State Labor Board's decision, regardless of its infirmity, held only that for purposes of the duty to negotiate the Housing Authority was plaintiffs' employer. The limited nature of this

determination precludes the inference, whether or not such an inference would be valid in other respects, that the City is not an employer of the Housing Police.[20/] Furthermore, federal law recognizes the doctrine of joint employers. See, e.g., Boire v. Greyhound Corp., 376 U.S. 473 (1964).

It thus appears beyond dispute that the City is plaintiffs' employer for the purposes of Title VII.

b. Civil service classification. The City maintains that the only means by which plaintiffs can become entitled to pay and benefits equal to those received by members of the Bridgeport Police Department is to compete with members of the

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20/ The Court notes also that by the time the State Labor Board issued its decision, the Housing Police had dropped the City as a party in the proceeding before the Board. Thus any finding by the Board that the City was plaintiffs' employer would have been gratuitous.

general public in the civil service examination for entrance to the Police Department and be hired as patrolmen.

Regardless of one's view of the plaintiffs' rightful status at the moment, the City's own civil service rules preclude requiring plaintiffs to take an entry-level examination. Section 6 of the Civil Service Provisions of the Charter of the City of Bridgeport (PX49) has provided as follows since 1949:

> In the event that the City absorbs or assumes operation of an interprise or function from, and theretofore conducted or performed by, the federal government, or any agency thereto, the state or another governmental sub-division thereof, or any private individual, business or agency, those employees who have been continuously engaged in such enterprise or function so taken over for not less than one year and who may be considered essential to its operation by the authority or officer of the city who has supervision of such new enterprise or function and the personnel director, shall be retained without preliminary or performance tests, and shall be regarded

> as holding their positions under probationary appointment, and shall thereafter be subject in all respects to the provisions of this act.

In this case the City has assumed the federal government's function in funding the Housing Police;[21] the members of the Housing Police have been continuously engaged as Housing Police officers for well over a year;[22] and any decision by Superintendent Walsh or the Civil Service Commission that the Housing Police are not essential to the City or that its members are not essential to the operation of the Housing Police clearly would be a gross abuse of discretion in light of the overwhelming evidence to the contrary introduced at the

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21/ In 1975 the City funded plaintiffs' positions itself; it is now paying the plaintiffs out of federal funds within the City's control.

22/ The Civil Service Commission's Rule V provides that the probationary period shall be not less than three months nor more than six months.

preliminary hearings and at trial.[23]/

c. Similarity of work performed by the Housing Police and the Bridgeport Police Department officers. I have already found that the plaintiffs' training and duties are identical in all significant respects to those of the Bridgeport Police Department officers. The major difference lies in the fact that the Housing Police have inferior arrest powers. This is a result of their classification as "special police," a classification that has no basis in their qualifications, and no relationship to the work they do.[24]/

23/ With regard to the City's obligation to dispense with its would-be requirement of examination for the Housing Police, see also the discussion concerning CETA and Model Cities infra; text acc. nn. 4-5 supra.

24/ Police Department order No. B-103, PX 16 at 2, lists the following as the exclusive duties of special police officers:

> Guards, patrols and polices assigned area and building in

Clearly plaintiffs' case of disparate impact violative of 42 U.S.C. §2000e-2(a)(2) is complete. The City has "segregated [and] classified [plaintiffs] in [a] way which would deprive or tend to deprive [them] of employment opoortunities or otherwise adversely affect their status as...employee[s] ...." And the adverse impact of the City's action falls entirely on the plaintiffs,

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24/ (cont.)

> part or full time work; polices park area, playgrounds, athletic fields and events; guards area and buildings such as the zoo, concessions, beaches, against vandalism, and objectionable persons; keeps order, locates parents of lost children, enforces ordinances; patrols parking lots, tags for meter violations, checks meters for defects, listens to complaints, incidentally may assist or substitute in specialized work of the particular agency to which assigned as for example, in cashiering work at the parking garage. The police protection plaintiffs provide for the Housing Authority, a dangerous and high-crime segment of the City, hardly falls within this description.

all minorities; no whites are adversely affected. Moreover, the quondam "justification" of business necessity in the form of inadequate financial resources is unimpressive in light of the City's current surplus.

2. Disparate Treatment. The facts relevant to disparate treatment analysis have been set out above. In sum, the plaintiffs' qualifications and duties are identical to those of Bridgeport Police Department officers, and yet plaintiffs have no job security, lower pay, and fewer benefits. The Police Department is 87% white, and the Housing Police are 100% minority. The disparity in treatment is clear, and easily supports an inference of discriminatory motive.

Allowing for differences resulting from the fact that McDonnell Douglas, supra, was a hiring case and the instant case involves disparity of treatment in the terms

and conditions of employment, satisfaction of the McDonnell Douglas test in this case is clear. The McDonnell Douglas prima facie case alone raises an inference of discrimination. Furnco Construction Corp. v. Waters, supra, 438 U.S. at 577, which the employercan dispel by "'articulat[ing] some legitimate, nondiscriminatory reason for the employee's [treatment],'" id. at 578, quoting McDonnell Douglas, supra, 411 U.S. at 802. This the City has failed to do.

The excuse of lack of funding is presently unpersuasive, since the City has a surplus and approximately fifty funded vacancies in the Police Department. Overwhelming evidence, including the mayor's admissions, PX 39, precludes the City from claiming that the plaintiffs are superfluous or replaceable: as a practical matter, police protection for the housing projects in Bridgeport depends entirely on the security of plaintiffs' employment.

Indeed, as I have found above, not only is the City's treatment of the plaintiffs without any "legitimate, nondiscriminatory" business reason or rational basis in public policy, it is in the words of plaintiff's counsel,

> a self-inflicted wound to the City of Bridgeport, an irrational action that is only made explicable by the observation that all the persons terminated are Black or Puerto Rican. The logic of this observation is reinforced by the fact that the other victims of the proposed termination--the residents of the housing projects--are also predominantly minority.

Plaintiffs' post-trial brief at 22.

The City has also argued, as if this were a hiring case, that its exemplary hiring of minorities in the Police Department rebuts any inference of discrimination in its treatment of the Housing Police. On its face the argument has little appeal; on the facts it is wholly meritless. In the first place, this is not a hiring case: plaintiffs were hired pursuant to a

model cities neighborhood recruitment plan, and have not claimed any discrimination in the hiring process.

Their complaint, rather, refers to discrimination in terms and conditions of employment and lay-offs. The City would have them compete with the general public to keep their jobs, a requirement that it does not claim to impose on Police Department officers.[25/] Plaintiffs are entitled to equality of treatment, not merely a chance to compete for equality.

25/ By analogy to the Equal Pay Act, it is not enough that plaintiffs have a theoretical opportunity to receive equal treatment by competing for positions in the Police Department. See Corning Glass Works v. Brennan, 417 U.S. 188 (1974), where the Court held that an employer did not cure the lingering effect of discrimination by opening its higher-paid night positions to women while maintaining the lower-paid day positions, most of which were held by women. "[T]he company could not cure its violation except by equalizing the base wages of female day inspectors with the higher rates paid the night inspectors." 417 U.S. at 206.

Second, although it may be true that 50% of the Police Department officers hired since 1973 are minorities, it is also true that these people were hired pursuant to court order and the Department remains 87% white.[26/]

The hiring history of the Police Department thus is not very impressive. The City's deplorable reputation as an employer, Association Against Discrimination in Employment v. City of Bridgeport, Civ. No. B-75-268, Memo. of Dec., Aug. 25, 1979, at 2, and the measures that have been necessary to achieve minimal integration of the Fire Department and the Police Department, see id.; Bridgeport Guardians v. Board of Civil Service Comm'rs., 354 F.Supp. 785, aff'd in part and rev'd in part, 482 F.2d 1333 (2d Cir. 1973), cert. denied, 421 U.S. 991

26/ Compare this figure with the figure of 59% for the white percentage of the population of the City as a whole.

(1975), place a very heavy burden on the City if it wishes to rebut the inference of discrimination here.[27] Minority hiring pursuant to court order, where the hiring does nothing to remedy the discriminatory treatment of plaintiffs, is no rebuttal. And even if the City had rebutted plaintiffs' prima facie case, the pellucid evidence of bad faith recounted above[28] would be more than sufficient refutation.

B. 42 U.S.C. § 1981 and 1983. Municipilaties are now subject to suit under §1983, Monell v. Department of Social Services, 436 U.S. 658 (1978); Quinn v. Syracuse Model Neighborhood Corp., No. 79-7561, Slip Op. at 825, 843 (2d Cir.,

27/ These factors are permissible support for the inference of continuing discrimination, Hazelwood School Dist. v. United States, 433 U.S. 299, 309 n.15 (1977), and as such strengthen the plaintiffs' prima facie case.

28/ See text acc. n.5 supra.

Jan. 8, 1980), and §1981, Garner v. Giarrusso, 571 F.2d 133 (5th Cir. 1978); Skyers v. Port Authority, 431 F. Supp. 79 (S.D.N.Y. 1976). The question whether §1981 bars only purposeful discrimination remains open, County of Los Angeles v. Davis, 47 U.S.L.W. 4317, 4323 (1979) (dissenting opinion, Powell, J.), although courts have held that employment practices having a discriminatory impact are remediable under §1981, see Davis v. County of Los Angeles, 566 F.2d 1334, 1340-41 (9th Cir. 1977, vacated as moot, 47 U.S.L.W. 4317 (1979) and cases there cited. In any event, the question lacks significance here, since §1981 clearly does bar employment discrimination, id., and I have found the City's conduct intentional. Further inquiry into the precise delimitations of plaintiffs' case under §1981 is unnecessary here, where only the issue of liability is before the Court, since "it seems clear that [§1981] affords no greater substantive protection than Title VII," New York City Transit Authority v. Beazer, 47 U.S.L.W. 4291,4295 n.24 (1975)

(dictum), and plaintiffs have not suggested otherwis

Although plaintiffs have not briefed their §1983 claim, they have indicated no intention to drop it.[29/] The Court concludes that the City is liable under that section for the following reasons. First of all, the City's treatment of plaintiffs clearly constritutes an official policy, and as such satisfies the "state action" requirement of §1983. Monell, supra, 436 U.S. at 690-95. Liability under §1983 for a violation of the Equal Protection Clause depends upon proof of discriminatory intent or purpose. Village of Arlington Heights v. Metropolitan Housing Development, 429 U.S. 252

29/ On the other hand, plaintiffs' post-trial brief and proposed findings and conclusions omitted any reference to the claims that the City violated §§ 1982 and 1985, which were included in the complaint. Since plaintiffs offered little or no evidence that would tend to show the applicability of either section, I consider any claims under these sections intentionally waived.

(1977); Washington v. Davis, 426 U.S. 229 (1976). De jur discrimination, however, is by nature intentional, Acha v. Beame, 428 F. Supp. 70, 79 (S.D.N.Y. 1977), aff'd 570 F.2d 57 (2d Cir. 1978), citing Washington v. Davis, supra, and Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); it exists where an official policy "expressly treats a class of persons in a less favorable manner," id. That is the case here: the City has developed an official policy of treating the all-minority Housing Police differently from the Bridgeport Police Department members,[30/] and has made its discriminatory animus evident.

30/ The inequality of treatment has two aspects here: one is the City's insistence that plaintiffs take and pass an entry-level civil service examination in order to acquire a chance of receiving the benefits of employment in the Police Department, a requirement that was overlooked in at least one instance of a white person's change of position (a change that was less nominal than it would be here). The other and complementary aspect is the City's policy of providing virtually no benefits to the all-minority

The city therefore is liable under §1983.

C. Model Cities. The requirements of the Model Cities Act and CDA 11 are unequivocal. CDA 11 required the City, as part of its "comprehensive city demonstration program," to incorporate plaintiffs' positions into its regular civil service system within two years. The City has failed to do so. Having concluded that the plaintiffs are appropriate parties to enforc the requirements of the statute and the regulation, I conclude now that the City's failure to fulfill the duty that the law so clearly imposes upon it renders it liable to the plaintiffs. See Cannon v. University of Chicago, 47 U.S.L.W. 4549 (1979).

30/ (cont.)

group that plaintiffs comprise while providing substantial benefits to an 87% white group that does the same work but has a different name.

D. CETA.[31] Section 122(f) of the Act, 29 U.S.C. §824(f), provides:

> The Secretary shall assure that prime sponsors have undertaken or will undertake, analyses and reevaluations of job descriptions and, where feasible, revisions of qualification requirements at all levels of employment, including civil service requirements and practices relating thereto, in accordance with regulations prescribed by the Secretary, with a view toward removing artificial barriers to public employment (as defined in section 802 of this title) of those whom it is the purpose of this chapter to assist.

The City is a prime sponsor under §10(a), 29 U.S.C. §811(a). Testimony of Mr. Gilmore, 3/7/79 at 42. Section 3(3) of the Act, 29 U.S.C. §802(3) defines artificial barriers to employment as "limitations in the hiring, firing, promotion, licensing, and other terms and conditions of employment which are not directly related to an individual's fitness or ability to perform the duties required by the employment position."

As in the case of the Model Cities Act, CETA §122(f) clearly imposes a duty upon the City as a prime sponsor. There is no evidence that the City has ever undertaken even to begin fulfilling that duty.[32] Indeed, if it had undertaken an investigation of its civil service provisions, it would have discovered an artificial barrier to employment that does not exist in its civil service provision, namely the requirement of an entry-level examination for persons in the plaintiffs' situation. As indicated above, the City is violating its own charter by attempting to impose

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32/ It is plaintiffs' burden to show a breach of that duty. Since this involves proving a negative, I consider plaintiffs' burden met by reference to the City's representations that it is requiring plaintiffs to take an entry-level exam in order to receive job benefits equal to those of the Police Department officers, and by the absence of even a scintilla of evidence indicating an attempt by the City to commence a sympathetic reevaluation of its polices with respect to plaintiffs.

this requirement on the plaintiffs. A more artificial barrier to employment is difficult to imagine. I conclude that the City is liable to plaintiffs for the breach of its duty under 29 U.S.C. §824(f).[33/]

Dated at Bridgeport, Connecticut this 29th day of January, 1980.

T.F. Gilroy Daly
United States District Judge

33/ The Bridgeport Area Manpower Consortium, the local administrator of CETA, is also a named defendant in this case. As the local agent of the Secretary of Labor, this body has the obligation under the §824(f) to assure that the prime sponsor fulfills its duties. Like the Housing Authority's duty under the Model Cities Act, this duty is rather nebulous. And as in the case of the Housing Authority, there is little if any indication that the Consortium had made any effort to make or receive the assurances the statute requires. Since I have concluded that plaintiffs have standing to enforce CETA provisions, and the Consortium has breached its statutory duty, plaintiffs are entitled to enforcement of that duty. Unlike the Model Cities Act and CDA 11, however, this CETA provision does not contain a time limit, and so the value of the plaintiffs' right under this section at the remedy phase may be academic only. But this is no reason to deny the existence of the right.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

MEMBERS OF THE BRIDGEPORT HOUSING AUTHORITY POLICE FORCE, ET AL, :	Filed June 11, 1980, Clerk U.S. District Court, Bridgeport, Conn.
-vs.- :	
CITY OF BRIDGEPORT, ET AL :	CIVIL ACTION No. B-77-130

SUPERSEDING MEMORANDUM OF DECISION & REMEDY ORDER

Plaintiffs have moved for clarification and modification of the Court's remedy order of June 2, 1980. The motion is GRANTED, and the Court accordingly issues this superseding memorandum of decision and remedy order, incorporating herein the clarifications plaintiffs have requested, to the extent they are appropriate.

This Court has found the defendant City of Bridgeport liable to plaintiffs for intentional discrimination in the terms and conditions of plaintiffs'

employment under Title VII, 42 U.S.C. §§ 1981 and 1983, The Model Cities Act and CETA; the Court also found the defendant Bridgeport Housing Authority liable to plaintiffs under the Model Cities Act for its failure to attempt to effect compliance with the Act.[1/] The City has discriminated against plaintiffs, who do the same work as Bridgeport Police Department officers, by denying them pay, status, promotional opportunities, fringe and pension benefits, and discipline and discharge rights equal to those enjoyed by Police Department officers.

1/ The Court assumes familiarity with the matters discussed in the opinion on liability filed in this case on January 29, 1980, 85 F.R.D. 624 (D. Conn. 1980).

The purpose of a remedy under Title VII[2/] is to make whole the victims of unlawful discrimination, Albemarle Paper Co. v. Moody, 422 U.S. 405, 421, 95 S.Ct. 2362, 2373, 45 L.Ed. 2d 280 (1975), and to put them in their "rightful place," Franks v. Bowman Transp. Co., 424 U.S. 747m 768m 96 S,Ct. 1251, 1266, 47 L.Ed.2d

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2/ 42 U.S.C. § 2000e 5(g) provides:

> (g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligency by the person or persons discriminated against shall operate

444 (1976), that is the position they would have held absent the defendant's discriminatory practices. That position in this case is one of parity with the Police Department officers in the terms enumerated above. The question presently before the Court, then, is how best to accomplish this statutory objective in the circumstances of this case.

Plaintiffs have suggested two alternatives and acknowledged the Court's discretion to allow the defendants to choose between them. The first alterna-

2/ (cont.)

> to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 2000e 3 (a) of this title.

tive would be to incorporate the plaintiffs into the Bridgeport Police Department. The second alternative would be to establish a housing authority police force pursuant to Conn. Gen. Stat. § 8-44b.[3/] Although the latter would

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3/ Any housing authority created by section 8 40 shall have the power to establish a housing authority police force, the members of which shall be known as housing authority police officers. Housing authority police officers shall be appointed by the local board, agency or person empowered to appoint municipal police officers, subject to approval of the housing authority. The requirements for appointment as a police officer in the municipality in which the housing authority is located, except for age and physical qualifications, shall be mandatory for housing authority police officers in such municipality. No person shall be appointed to such housing authority police force unless he has been awarded a certificate attesting to his successful completion of an approved municipal police basic training program, as provided in section 7-294e. The initial appointment shall be for a probationary term upon completion of which the appointing authority may promote such probationary officers to permanent status; provided such promotion shall be in accordance with procedures applicable to municipal police officers in the municipality and shall be made subject to the approval of the housing authority. Housing authority police officers shall have and exercise the powers and authority conferred upon municipal police officers and shall be subject to

be administratively the more complex solution, it is the one the City favors. Partly because of the legal and administrative complexities of such a remedy, and partly because of its deficiencies as equitable relief, this Court would consider any sanction of it a poor exercise of the Court's discretion.

To the extent that the Court's remedy order were fashioned in conformity with the state law, the Housing Police would be subject to two possibly conflicting lines of authority. Because the statute provides that members of a housing authority police force are employees of the housing authority, it presumably contemplates the existence of some of the incidents of the employer-

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3/ (cont.)
the ultimate supervision and control of the chief of police of the municipality in which the housing authority operates.

Conn. Gen. Stat. 8-44b.

employee relationship between the housing police officers and the housing authority.[4/] The statute also provides, however, that housing police are "subject to the ultimate supervision and control of the chief of police in the municipality in which the housing authority operates." Since supervision and control (along with payment of wages) are indicia of an employer-employee relationship for purposes of Title VII analysis, federal law would regard plaintiffs as employees of the City. Thus the City would be obliged to afford the Housing Police terms and conditions of employment equal to those of Police Department officers, but would not necessarily negotiate those terms with the Housing Police. The Housing Authority, on the other hand,

4/ See City of Bridgeport v. Housing Police Local 1303, Case No. MPP 3081, Dec. No. 1492 (Conn. Bd. of Lab. Rel., Feb. 1, 1977), appeal dismissed, No. 115665 (C.P. Jan. 31, 1978).

although obliged to negotiate with the Housing Police,[5/] would be powerless (absent some drastic changes in its financial position and its relationship with the City) to effect any terms it negotiated with its "employees."

It is probably true that the City and the Housing Authority could cooperate in a manner that would avoid this and similar problems. And it is certainly clear that this Court could fashion a remedy order that might require them to do so. But the need for imbedding an already sufficiently complicated situation in such a potential administrative morass is not at all apparent. The Court has not only "broad power

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5/ See n. 3 supra & acc. text

In addition, the power of the Housing Authority to negotiate with anyone presently is open to question, since it appears that for more than a month now there has been an insufficient number of commissioners of the Housing Authority to constitute a quorum under Conn. Gen. Stat. § 8 41.

as a court of equity to remedy the vestiges of past discriminatory practice," Rios v. Enterprise Ass'n. Steamfitters Local 638, 501 F.2d 622, 629 (2d Cir. 1974), but also "the duty to render a decree which will so far as possible...bar like discrimination in the future, "Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975), quoting Louisiana v. United States, 380 U.S. 145, 154 (1965). Without continuous court supervision, the kind of administrative complexity described above seems to offer greater opportunities for further discrimination than would a simpler solution.

For these reasons, and in light of the fact that the City has not articulated its reasons for preferring this alternative and none are readily apparent,[6/] the

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6/ The most plausible reason that comes to mind is concern for the safety of the residents of the housing projects. This concern, however, need not enter the Court's deliberations in this

Court rejects the Housing Authority Police Force alternative. An order incorporating plaintiffs into the Bridgeport Police Department, on the other hand, would put plaintiffs in their rightful place, the position they would have held absent discrimination, without subjecting all the parties to the administrative complexity and uncertainty of the statutory housing police force alternative. Accordingly, it is this alternative the Court chooses: the City must swear in as members of the Bridgeport Police Department all plaintiffs who are current mem-

6/ (cont.)
context. It is the City's responsibility to provide police protection for the housing projects. This responsibility can be fulfilled equally well whether the officers assigned to the projects are denominated Housing Police or Bridgeport Police Department officers.

The Court does not intend to limit the City's ability to serve the housing projects in any manner. This order does not by any means preclude the establishment of a housing authority unit of the Police Department for which plaintiffs or other police officers may volunteer. Nor does it preclude any other non-discriminatory action the City may wish to take.

bers of the Housing Authority Police Force.[7/]

7/ The following is a list of plaintiffs who are currently members in good standing of the Housing Police Force, with the date of hire for each:

Elbert Barnes	10/07/71
Robert B. Cox	10/15/73
Juan Crespo	10/07/71
Frank Davis	10/07/71
Ulysses A. Davis	10/15/73
Serafin Garcia	9/16/64
Hector L. Jimenez	10/07/71
Ramon Laracuente	5/18/70
Edward Lomax	10/07/71
James Lomax	1/08/72
William Liggins	10/15/73
Frank Maldonado	10/07/71
Willie C. McBride	5/18/70
Walter F. McNeil	10/15/73
Miguel A. Nieves	2/26/73
Cecilio Ortiz	9/30/68
Donald Peeler	10/07/71
Hector Resto	10/15/73
Pedro Rivera	10/07/71
Jose M. Rodriguez	7/26/73
Luis Santana	7/22/74
Hubert L. Sims	1/16/63
Eddie W. Tosado	10/07/71
Pedro Villanueva	3/26/73

Members of the Housing Police Force whose police powers have been terminated[8] or who have been terminated for disciplinary reasons[9] need not necessarily be sworn in as members of the Bridgeport Police Department in good standing. However, one of the conditions of plaintiffs' employment that this Court found discriminatory was their lack of job security. And the City has acknowledged that plaintiffs have not enjoyed the same rights of appeal from termination decisions as Bridgeport Police Department officers.

8/ The following is a list of plaintiffs who have had their police powers terminated by the Board of Police Commissioners, with the date of hire for each.

Kenneth E. Farrar	10/07/71
Nathaniel Ham	10/15/73
Pedro Hernandez	10/07/71

9/ The following is a list of plaintiffs who have been terminated for disciplinary reasons, with the dates of hire and termination, respectively, for each.

Reginald Taylor	10/15/73	3/18/77
David Clark	12/73	12/26/75

See City's Response to Plaintiffs' Proposed Remedy Order, filed April 11, 1980. In order to remedy this discrimination and provide the plaintiffs with equal protection, the City must provide the five terminated plaintiffs with the same hearings and rights of appeal enjoyed by Bridgeport Police Department officers.[10/] Until they have had a full opportunity to exercise these rights, these officers shall have the same rights and duties as a police department officer in their position. If the required proceedings result in a reversal of the termination decisions, these plaintiffs shall then be sworn in as members of the Bridgeport Police Department.

10/ It is not clear from the record the extent to which these requirements may already have been satisfied. The Court does not mean to require duplicative proceedings, however, but only the same process afforded suspended or terminated Police Department officers.

Simply being sworn in as members of the Bridgeport Police Department will not afford plaintiffs the full remedy to which they are entitled under Title VII and 42 U.S.C. §§ 1981 and 1983. Backpay is "the rule rather than the exception under Title VII." EEOC v. Local 638, 532 F.2d 821, 832 (2d Cir. 1976). The availability of this remedy does not limit the remedy available under § 1981, Johnson v. Railway Express Agency, 421 U.S. 454, 460 (1975), which encompasses both legal and equitable relief, including backpay, id.

The City contends that plaintiffs' claims for backpay are barred by laches. This Court has held, albeit without specific reference to any particular element of remedy, that defendants' claim of laches is without merit. The City has shown no reason to alter that holding at this point. It claims that its budget and tax rate computations have been

prejudiced by plaintiffs' alleged delay. Assuming arguendo that there has been any delay, it is difficult to see that any prejudice has resulted from it. Any financial difficulties of the City following this lawsuit stem not from the plaintiffs' action or inaction, but from the City's failure to recognize earlier its obligations to the plaintiffs. Accordingly, plaintiffs are entitled to backpay.

As to the time period the backpay award should cover, the City seems to be in substantial agreement with the plaintiffs. Title VII limits awards of backpay to a period not exceeding two years before filing of the charge with the EEOC. 42 U.S.C. § 2000e-5(g). Since plaintiffs filed their charge in this case on August 18, 1976, they should receive backpay from August 18, 1974. But such equitable relief is available also under

§§ 1981 and 1983, see, e.g., Johnson v. Railway Express Agency, supra, and the statute of limitations under those statutes is three years, Williams v. Walsh, 558 F.2d 667 (2d Cir. 1977). The operative date therefore is April 26, 1974, three years before plaintiffs filed their complaint in this case with the Court.[11/] And since the discrimination in this case clearly has been continuing since well before the statutory cut-off dates for backpay, a more recent cut-off would be inappropriate.

11/ The City agrees to this limit only "assuming that the Court is correct in [having found] intentional discrimination." The necessity of this finding as a basis for equitable relief is open to question after Owen v. City of Independence, 48 U.S.L.W. 4389 (1980). But in any event, this Court has found intentional discrimination and bad faith on the City's part, and that finding clearly supports an order providing relief under §§ 1981 and 1983. Johnson v. Railway Express Agency, supra.

The City urges that the Court should not award backpay because each plaintiff has not proved both entitlement to and amount of backpay. As to entitlement, plaintiffs are or were members of the Housing Police Force. As such the Court has held them to be victims of employment discrimination remediable under Title VII and 42 U.S.C. §§ 1981 and 1983; the City therefore must pay them backpay. This conclusion applies most clearly to plaintiffs who are presently Housing Police. Each such plaintiff shall receive backpay from April 26, 1974 or his date of hire, whichever is later.

As to those plaintiffs who have resigned since that date, plaintiffs claim entitlement to full relief, for periods both before and after their resignations. Under International Bhd. of Teamsters v. United States, 431 U.S. 324, 364-67 (1977), if an employee would have acted in a certain

way but for discrimination, he is entitled to benefits he would have received had he so acted. However, there is no evidence before the Court tending to suggest that any Housing Police resignations resulted from discriminatory treatment. Consequently, a plaintiff who has resigned from the Housing Police Force[12/] is entitled to backpay only from April 26, 1974

12/ The following is a list of plaintiffs who have resigned from the Housing Police Force, with dates of hire and resignation, respectively, for each:

George Alcover	10/01/71	9/19/79
Remijio Alvarez	12/71	6/07/76
Peter Aranjo	10/15/73	6/14/79
Antonio Brown	10/10/71	12/18/78
Antonio Bargos	10/26/71	6/19/77
Preston Caviness	9/03/74	1/22/80
Pedro Cosme	2/26/74	9/29/79
Angel Duran	8/18/71	10/22/76
Anthony J. Gomez	3/26/73	3/31/78
Ramos Ladisloa	5/18/70	6/01/76
Petro Marrero	5/18/70	10/27/76
James A. Mitchell	10/07/71	11/15/76
Douglas Quarrels	3/26/73	7/24/79
Nathaniel Santiago	3/26/73	2/21/80
Bruce Simons	10/15/73	7/24/77
Richard Silva	10/07/71	3/17/75
James Smith	9/09/67	8/16/74

or his date of hire, whichever is later, to the date of resignation. Cf. Mitchell v. Trustees of Pickens Cty. Sch. Dist. A, 415 F. Supp. 512, 519 (D.S.C. 1976) (where school district violated Title VII by refusing to rehire plaintiff because of plaintiff's pregnancy, plaintiff entitled to backpay from effective date of refusal to date she would have resigned or taken leave).

As to the plaintiffs who were terminated, their entitlement to backpay depends on the results of their opportunity to exercise the rights of Police Department officers regarding termination decisions. Each of the plaintiffs who was terminated is entitled to backpay from April 26, 1974 or his date of hire, whichever is later, to the date of his termination. Any officer who is reinstated under

the terms of this order[13/] shall receive also a further award of backpay determined as if he had been a Police Department officer on the date he was terminated.

For the purposes of this order backpay shall include the sum value of all regular and overtime wages, fringe benefits, pension benefits, and all other benefits to which Bridgeport Police Department officers are or were entitled under union contracts, including all increments, together with interest at 6% per annum and front pay from the date of this order to the date plaintiffs are sworn in as members of the Bridgeport Police Department.[14/] Backpay so computed

13/ See nn.8-10 & acc. text supra.

14/ In the case of plaintiffs presently suspended or terminated, see nn. 8-10 & acc. text supra, the backpay period shall extend to the date of termination. Any such plaintiff who is reinstated shall receive the further award stated above. See text acc. n.13 supra.

shall be reduced by the sum of amounts earned or earnable with reasonable diligence, together with amounts of any welfare or unemployment compensation received, if any. To the extent that plaintiffs receive retroactive seniority and pension benefits, they shall not receive the cash value of these benefits, as backpay. Plaintiffs shall submit to the Court within 60 days the data necessary to make the above computation of backpay. In making the above calculations the Court will compare with plaintiffs' compensation the compensation of those Police Department officers whose seniority is most nearly equal to the plaintiffs'. Set-offs from backpay shall not include amounts plaintiffs earned at part-time jobs held concurrently with a position on the Housing Police Force, if a Housing Police Officer would have been able to hold that part-time job had he been a

Police Department officer. See e.g., Laugesen v. Anaconda Co., 510 F.2d 307, 317-18 (6th Cir. 1975).

With regard to seniority rights, the discrimination against plaintiffs did not begin until 1972. The Housing Police began operation late in the Spring of 1970. CDA Letter 11 then gave the City two years to incorporate plaintiffs into its regular civil service system. See Memorandum of Decision filed January 29, 1980, at 42, 85 F.R.D. 624 (D. Conn. 1980). The City charter (PX 49) provides that at the end of the two year period plaintiffs would be on probation for six months. The earliest date to which seniority should be retroactive, therefore, is the Fall of 1972.

Whether plaintiffs should receive seniority retroactive to that date, or at all, is governed by § 703(h) of Title VII, 42 U.S.C.§ 2000e-5(h). This provi-

sion protects "the routine application of a bona fide seniority system" Teamsters, supra, 431 U.S. at 352.

> Although a seniority system tends to perpetuate the effects of pre-Act discrimination..., the congressional judgment was that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the Act.

Id. at 352-53. As noted above, the discrimination in this case occurred after the effective date of the amendments making the Act applicable to municipalities. As such, it is subject to remedy by an award of retroactive seniority and such remedy is not barred by §703(h). Franks v. Bowman Transp. Co., supra, 424 U.S. at 757 et seq.

> Adequate relief may well be denied in the absence of a seniority remedy slotting the victim in that position in the seniority system that would have been his had he been hired at the time of his application. It can hardly

> be questioned that ordinarily such relief will be necessary to achieve the "make-whole" purposes of the Act.

Id. at 764-66 (emphasis added). The reference in the above quotation to "hiring" should apply with equal or greater force to the process of lateral assimilation into the City's civil service system with the concomitant increase in benefits to which this Court has found plaintiffs were entitled in the Fall of 1972. Thus even assuming the seniority system of the Police Department were in other respects unobjectionable, its existence concurrent with the discriminatory terms and conditions of plaintiffs' employment vitiates any claim it might have to be considered bona fide. For these reasons, and absent any persuasive counter-arguments from any of the defendants, each plaintiff who is currently a member of the Housing Police in good standing shall receive full seniority retroactive to January 1,

1973,[15] or his date of hire, whichever is later. The seniority rights of plaintiffs who have been terminated or threatened with termination will depend, as in the case with backpay, on the results of their opportunity to exercise their rights with respect to termination decisions.[16] Plaintiffs who resigned upon appointment to the Bridgeport Police Department shall receive full seniority retroactive to January 1, 1973, or their respective dates of hire, whichever is later. As to the other plaintiffs who resigned, the question of seniority is moot.

The final matter plaintiffs would have the Court address is their entitlement to costs and attorneys' fees. 42

15/ The choice of this date appears preferable to any attempt to pinpoint the actual date in the Fall of 1972 when plaintiffs' entitlement to equal treatment with the Police Department accrued.

16/ See text acc. n.13 supra.

U.S.C. §§ 1988 and 2000e-5(g) clearly guarantee fees and costs to plaintiffs who have prevailed, as have plaintiffs here. Northcross v. Memphis Bd. of Ed., 412 U.S. 427 (1973); Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968). Plaintiffs thus are entitled to costs and reasonable attorneys' fees, to be paid by the City in an amount to be determined at a later date.

Judgment shall enter on the matters enumerated herein. The Court reserves judgment on the matter of the 1980 Police Department Sergeants' examination. See Fed. R. Civ. P. 54(b).

Dated at Bridgeport, Connecticut this 11th day of June, 1978.

T.F. Gilroy Daly
United States District Judge

Opposition

Office-Supreme Court, U.S.
FILED
AUG 20 1981
ALEXANDER L. STEVAS,
CLERK

81-295

No.

In The

Supreme Court of the United States

October Term, 1981

MEMBERS OF THE BRIDGEPORT HOUSING AUTHORITY POLICE FORCE, ET AL
Petitioners,

VS.

CITY OF BRIDGEPORT, ET AL
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Where appointments to positions within a municipality's police department are made strictly in accordance with that municipality's merit system, the bona fideness of which the plaintiffs do not challenge, and where the plaintiffs, not being members of that municipality's police department, having failed to satisfy the requirements of such merit system for appointment, hold positions as housing security officers who perform duties equivalent to those performed by police officers, whether Title *VII* of the Civil Rights Act of 1964, as amended, requires such a municipality to provide plaintiffs with benefits equal to the benefits it provides members of its police department or whether it can lawfully condition the payment of more favorable benefits upon an individual's appointment to its police department pursuant to a bona fide merit system.

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I

STATEMENT OF THE CASE

In 1949 the Bridgeport Housing Authority was created pursuant to the provisions of Section 8-40 of the Connecticut General Statutes, Revision of 1958, as amended, and has existed thereafter as a public corporation whose purpose is to plan, create and administer the housing projects of the City of Bridgeport. Within the City of Bridgeport there are seven such housing developments, all of which, except for one, were constructed between the years of 1940 and 1960. The current population of these housing projects is composed predominantly of black and hispanic residents.

Prior to 1970 the Bridgeport Housing Authority employed a number of individuals as security guards. In 1971, with funds from a grant awarded to the City of Bridgeport under the Model Cities Act, a unit of twenty individuals were employed as housing security officers and constitued the Bridgeport Housing Authority Security Force. Thereafter, between 1971 and 1973, the Housing Authority Security Force employed as many as fifty-two officers at a given time. However, since 1974, no additional individuals have been hired as security officers and the Housing Authority Security Force now consists of approximately twenty-seven officers.

The positions of housing security officers were not created nor filled under the merit requirements of the Civil Service Provisions of the Charter of the City of Bridgeport. Individuals hired as security officers were selected by a committee composed of residents of the model cities areas within the City of Bridgeport and one member of the Bridgeport Police Department. Hiring was done by the committee as a whole, in conformity with the procedures adopted pursuant to the Model Cities Act, including affirmative action and preference for residents of model cities neighborhoods. In that the population of the model cities neighborhoods were predominantly minority, the Housing Authority Security Force, through the years of its

existence, reflected this composition and, likewise, was comprised predominantly of minority officers.

Funding for the Housing Security Force prior to 1980 came from a variety of sources, including the funds of the Bridgeport Housing Authority. Since 1970, as noted above, the primary source of funding was provided under the Model Cities Act. By the time of the expiration of the Model Cities Act in 1975, Title 42 U.S.C. Section 3311, Model Cities funds were being used to fund all of the Housing Security Officers' positions. With the expiration of the Model Cities Act, the City of Bridgeport, for one year, provided funding to the Bridgeport Housing Authority to cover the salaries of the members of the Housing Authority Security Force. Thereafter, due to a municipal fiscal crisis, no additional funds were provided the Bridgeport Housing Authority by the City of Bridgeport to pay the salaries of the security officers. When the funds provided by the City of Bridgeport were exhausted, the housing security officers were laid off for a period of time and later rehired into positions funded under CETA. The CETA funds were supplemented with funds received by the City of Bridgeport under the "block grant" provisions of the Community Development Act, 42 U.S.C. Sections 5301 et seq. On December 31, 1979, plaintiffs eligibility for continued employment under CETA expired. The City of Bridgeport has continued, however, to provide additional funds to the Bridgeport Housing Authority from its "block grant" in order to keep the Housing Security Force funded, although it has made no plans nor commitments to continue this funding indefinitely into the future.

Since 1935, all positions within the Bridgeport Police Department have come within the classified service of the City of Bridgeport. Appointments to classified positions within the Bridgeport Police Department, must be made by the appointing authority, in this case the Board of Police Commissioners, from an appropriate employment list established by the civil service commission from the results of competitive examinations. Whenever vacancies in the Police Department are to be filled,

appointments are made from the eligibility list strictly in the order of the candidate's standing on the eligibility list.

> "The salient difference between the two forces is the basis on which hiring decisions are made. Hiring for the Housing Police followed the guidelines of the Model Cities Act, which required selection by a committee of residents of the model cities neighborhoods and a member of the City Police Department. The selection committee carried out the Act's policies of both affirmative action with respect to minority members and preference for neighborhood residents. The Police Department, under the City's standard civil service practices, hires applicants strictly in accordance with the ranking of their passing scores on a written examination. Reflecting this difference in the method of initial selection, the two entities have been treated as entirely separate units. The Housing Police are paid substantially less than the officers of the Police Department, and lack the job security, pension benefits, and procedural protections available to the regular police force."
>
> *Members of the Bridgeport Housing* v. *City of Bridgeport,* 646 F.2d 55, 58 (2d Cir. 1981).

Since 1971, the City of Bridgeport has conducted two placement examinations to determine eligibility for appointments to the positions of police officer within the Bridgeport Police Department. The first exam was held in 1947 and was the result of the decision rendered in the case of *Bridgeport Guardians* v. *Board of Civil Service Commissioners,* 482 F.2d 1333 (2d Cir. 1971) (*Guardians I*) *affirming in part and reversing in part* 354 F.Supp. 785 (D.Conn. 1971). Pursuant to the court's decision, which required quota relief, and under its direction the City of Bridgeport conducted a "minority pool" examination to screen minority candidates for appointments to the Bridgeport Police Department. The plaintiffs in the present action were eligible for this test, which was limited solely to minority candidates,

and most, if not all, plaintiffs applied and sat for this test, although not receiving appointments due to their scores on the exam.

The second placement test, conducted in 1977, was the result of a joint effort on the part of the City of Bridgeport and the Bridgeport Guardians, an association of minority police officers, to select a testing device that would be both racially fair and job related. Again, virtually all of the plaintiffs applied and sat for this examination, but did not receive appointments to the Bridgeport Police Department as a result of their ratings on the exam.

No claim has ever been advanced by the plaintiffs that these selection devices illegally prevented them from becoming members of the Bridgeport Police Department on account of their race. Further no claim has been made by the plaintiffs that they were illegally excluded on account of their race from membership in the Bridgeport Police Department as a result of the City's post-Title *VII* application of its merit system. Those plaintiffs who testified, stated without exception, that they were not deterred from applying for positions within the Bridgeport Police Department, nor were they steered from positions within the Bridgeport Police Department into positions with the Housing Authority.

In addition, the plaintiffs produced no evidence, whatsoever, that would even remotely indicate that the tests, the job-relatedness of which they question for the first time in their petition for certiorari, had an adverse impact on minority candidates. The question of the discriminatory effect of the tests, as well as the question of their validity, were never raised by the plaintiffs. Neither did they claim that the tests were discriminatory nor did they present any evidence that these tests produced an adverse impact on the minority candidates who took the examinations. The facts of the present case do not present a situation where the plaintiffs were discriminatorily excluded from membership in the Bridgeport Police Department, nor do the plaintiffs claim such discrimination.

In fact, the evidence shows just the opposite. The racial composition of the Bridgeport Police Department at the time of trial indicates that of a total strength of 400 officers, 87%of whom are white and 13% are minority. There are approximately 400 members of the department of which 52 are minority. However, at the time of the decision in *Guardians I,* supra the department had a total strength of 469 of which 17 were minority and 452 were white. Since the date of the Court's decision in *Guardians I,* 110 police officers have been hired of which 55 were minority appointees. Thirty-four minority officers of the fifty-five were hired pursuant to the remedy provisions of *Guardians I,* the balance being employed through functioning of the City's civil service system.

Nor did the plaintiffs produce any evidence to establish that the application of the civil service system barred housing authority security officers from becoming members of the Bridgeport Police Department, provided they qualify through their performance on competitive civil service examinations. Approximately ten former members of the housing authority security force have been appointed through the City's merit system to positions within the Bridgeport Police Department. These former members of the housing authority force receive benefits equal to those received by all other members of the Bridgeport Police Department of the same rank and seniority regardless of their race or national origin.

> "In rejecting Title *VII* liability in the circumstances of this case, we note the absence of any evidence that minority group members have been denied a full opportunity to compete for positions in the Police Department, or have been steered into positions with the Housing Police. On the contrary, it appears that virtually all members of the Housing Police have taken the examination for the Police Department, and those who passed have been hired. Moreover, it is undisputed that the reason for the minority composition of the Housing Police is not that minority group members have been steered to it as an alternative to the Police

> Department, but that it was organized as an affirmative action program to provide minority employment opportunity...."
>
> *Members of Bridgeport Housing* v. *City of Bridgeport*, 646 F.2d 55, 62 (2d Cir. 1981).

Upon becoming a member of the Bridgeport Police Department, an individual, regardless of his race or national origin, becomes entitled to the same benefits as other members of the police department of like rank and seniority. No distinction, based upon race or national origin, is made in the benefits provided members of the Bridgeport Police Department.

REASONS FOR DENYING CERTIORARI

In their petition for certiorari, the plaintiffs claim that the Court of Appeals for the Second Circuit departed from clear and settled rulings of this Court by not requiring the defendants prove the job-relatedness of the selection procedures used by the City of Bridgeport in making appointments to positions within its police department. By implication, the defendants would have this Court believe that they proved that the selection procedures used by the City of Bridgeport in making appointments to its police department had an adverse impact on minority applicants, thereby requiring the defendants to prove the job-relatedness of the procedures. However, nothing could be further from the truth. The plaintiffs never put into issue the legality of the selection procedures used to appoint candidates to the police department. Specifically, they never claimed, be it in their complaint or in any subsequent proceedings, that the selection procedures used by the defendants discriminated on the basis of race, or on any other forbidden ground.

The plaintiffs have completely misstated the facts of the present case in an attempt to gloss over the simple fact that they neither challenged nor questioned, in the least, the bona fides of the merit system for hiring into the Police Department.

> "...Appellees are not, in this litigation, attacking the bona fides of the merit system for hiring into the Police Department. As the District Judge recognized, this is not a hiring case. Indeed, the job-relatedness of the most recently used entry-level examination for Bridgeport police officers has been upheld in state court litigation. *Armeno* v. *Bridgeport Civil Service Commission,* No. 167722 (Super. Ct. Conn. July 28, 1978)...." *Members of Bridgeport Housing* v. *City of Bridgeport,* supra at p. 61.

From the start of this litigation it had always been the plaintiffs' claim that since they performed duties equivalent to the duties performed by members of the Bridgeport Police Department, the payment to them of benefits equal to those provided Bridgeport police officers constituted forbidden racial discrimination. The defendants, to the contrary, claimed that higher benefits were available to members of its Police Department not because of the racial composition of that force but solely because all members of that force had successfully completed the required civil service examination, whereas members of the Housing Police had not passed any qualifying examination. *Members of Bridgeport Housing* v. *City of Bridgeport,* supra at p. 59. Race or national original was not a consideration involved. The defendants had conditioned payment of the benefits provided members of the police department to only those individuals who qualified for appointment to positions within the police department through its merit system. This is true regardless of an individual's race or national origin. All Bridgeport Police Officers, irrespective of their race or national origin, receive the same benefits. The sole qualifying requirement is appointment to positions in the police department through the defendants' merit system.

At no time during the course of this litigation did the plaintiffs claim or produce evidence that the defendants' merit system operated discriminatorily to illegally exclude the plaintiffs from membership in the Bridgeport Police Department.

> "In rejecting Title *VII* liability in the circumstances of this case, we note the absence of any evidence that minority group members have been denied a full opportunity to compete for positions in the Police Department, or have been steered into positions with the Housing Police. On the contrary, it appears that virtually all members of the Housing Police have taken the examination for the Police Department, and those who passed have been hired. Moreover, it is undisputed that the reason for the minority compositions of the Housing Police is not that minority group members have been steered to it as an alternative to the Police Department, but that it was organized as an affirmative action program to provide minority employment opportunity." *Members of Bridgeport Housing* v. *City of Bridgeport,* supra at 62.

As noted by the Court of Appeals, since its decision in the case of *Bridgeport Guardians* v. *Members of the Bridgeport Civil Service Commission,* 354 F. Supp. 785 (D.Conn.) aff'd in part and rev'd in part, 482 F.2d 1333 (2d Cir. 1971), cert. denied, 421 U.S. 991, 95 S. Ct. 1997, 44 L. Ed. 2d 481 (1975) the defendants have conducted two selection tests for appointments to the Bridgeport Police Department. In that case both the District Court and the Court of Appeals found that the examination administered by the defendants for employment as police officer discriminated on the basis of race and quota hiring was ordered. Pursuant to the District Court's remedy order, the defendants conducted the first of the two mentioned selection devices. This first examination was restricted solely to minority applicants. Virtually all of the plaintiffs took the test, but were not appointed to positions in the police department because they did not achieve passing scores. The second test was held in 1977. Again, virtually all of the plaintiffs sat for this examination but did not receive appointments to the police department due to their test scores. See *Armeno* v. *Bridgeport Civil Service Commission,* 446 F. Supp. 533 (D. Conn. 1978); *Armeno* v. *Civil Service Commission,* No. 167722 (Super. Ct. Conn. July 28, 1978). As a result of the *Guardian* litigation and

the two subsequent selection tests, minority representation on the police force has risen from 3 percent to 13 percent. In addition, ten former members of the Housing Police passed the selection tests and have been appointed to the police department.

As previously mentioned, the plaintiffs never claimed that these selection devices discriminated against minority applicants (or in the least, against themselves), nor did they produce any evidence at trial to establish such a claim. In fact, they produced no evidence, whatsoever, concerning the impact of these examinations on the applicants who sat for them. Nor did they at any time during the course of this litigation question the validity of the tests under job-related standards, as they seem to for the first time in their petition for certiorari. That "(a)ppellees (were) not, in this litigation, attacking the bona fides of the merit system for hiring into the Police Department," *Members of Bridgeport Housing* v. *City of Bridgeport,* supra at p. 61, cannot be disputed on the record of this case.

CONCLUSION

The decision of the Court of Appeals that the City's use of civil service examinations as a qualification for hiring into the regular Police Department provides a complete defense to the plaintiffs' Title *VII* claim deviates not in the least from the holdings of the United States Supreme Court that have gone before it. In the first place, the statutory language of Section 703(h) of Title *VII*, 42 U.S.C. Section 2000e-2(h) (1976), in most certain terms provides for such a defense. *Members of Bridgeport Housing* v. *City of Bridgeport*, supra, at p. 61. And the holdings of the United States Supreme Court in *Teamsters* v. *United States*, 431 U.S. 324 (1977) and *California Brewers Ass'n.* v. *Bryant*, 444 U.S. 598 (1980) necessitate the result reached by the Court of Appeals in its application of the statutory language to the facts of the instant case.

Respectfully submitted,

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